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Supreme Court of the United States

October Term, 1996

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE; WILLIAM GIBSON, Doctor; FREDERICK CALHOUN JAMES, Bishop; HERBERT WILLIAMS, Reverend; WILLIE B. OWENS; SOUTH CAROLINA CONFERENCE OF THE NAACP BRANCHES; MICHAEL G. BURTON, as Executive Director on behalf of the Republican Party; WILLIAM P. COLLINS, III; EARLY COPELAND; WILLIAM PATRICK FLACK; FRANK E. GIBSON, III; NANCY D. HAWK; and GUS ROBERTS,

versus *Petitioners,*

DAVID M. BEASLEY, in his official capacity as Governor of South Carolina; DAVID H. WILKINS, in his official capacity as Speaker of the South Carolina House of Representatives, and THE SOUTH CAROLINA SENATE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in rejecting, in conflict with the decisions of every other circuit, "catalyst" theory of causation in determining prevailing party status under 42 U.S.C. §§ 1973l(e) and 1988, and in ruling that petitioners were not entitled to a fee award because they did not secure "an enforceable judgment" against the defendants?

2. Whether the court of appeals erred in denying fees to petitioners, who secured an enforceable judgment against the defendants on their claim that special senate elections were subject to Section 5 of the Voting Rights Act, on the ground that the judgment was not "material?"

LIST OF ALL PARTIES BELOW

The caption contains the names of all parties to the proceedings in the court of appeals.

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The October 30, 1996 opinion of the court of appeals affirming the decision of the district court denying petitioners attorney's fees is unreported and appears in the appendix hereto, App. 1. The December 15, 1995 order of the district court is unreported and appears in the appendix hereto, App. 11.

JURISDICTION

The opinion of the court of appeals sought to be reviewed was entered on October 30, 1996. Jurisdiction to review on a writ of certiorari the opinion in question is conferred by 28 U.S.C. § 1254(1). This petition is being filed within 90 days after entry of the opinion of the court of appeals.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 42 U.S.C. § 1973l(e), which provides that:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

and, 42 U.S.C. § 1988, which provides that:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985,

> and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioners appeal the denial by the court below of attorney's fees and costs.[1] The court of appeals, rejecting the catalyst theory of causation adopted by all 11 of the other circuits which have considered the matter, held that petitioners were not prevailing parties, despite the fact that they secured both court ordered and subsequently legislative redistricting, because they had not secured "an enforceable judgment."

The facts in this case are not in dispute. The 1990 census showed that South Carolina's congressional and legislative districts were malapportioned. App. 4. The general assembly failed to pass any redistricting plans before the 1990-91 legislative session adjourned in June,

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[1] Petitioners, who were the plaintiffs/appellants below, are the Statewide Reapportionment Advisory Committee (an unincorporated association of private individuals and organizations in South Carolina), the South Carolina State Conference of NAACP Branches, and several African-American residents of the state (hereinafter collectively referred to as "SRAC"), and the executive director of the South Carolina Republican Party and several of its members (hereinafter "Republican Party").

1991. *Id.* The Republican Party filed its complaint on October 4, 1991, and SRAC filed its complaint on October 31, 1991. The law suits were an effort to break the legislative impasse and insure that elections would be held in a timely, constitutional manner. *Id.* Petitioners succeeded in all of these objectives.

Both the Republican Party and SRAC alleged that the existing congressional and legislative districts in South Carolina violated one person, one vote and diluted minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. They requested the district court to order interim court ordered redistricting on the grounds that the general assembly had failed to redistrict during the 1991 legislative session, and that there was not enough time prior to the 1992 elections for the state to redistrict and comply with the preclearance provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. A three-judge court was constituted to hear the complaints pursuant to 28 U.S.C. § 2284, and the cases were consolidated for trial. App. 4.

The general assembly reconvened on January 14, 1992 and adopted redistricting plans for the senate and house. The governor vetoed the plans on January 29, 1992 on the ground that they did not comply with Section 2, and the vetoes were sustained. The senate and house passed separate bills for congressional redistricting but no plan was enacted by the general assembly. App. 4; *Burton v. Sheheen*, 793 F.Supp. 1329, 1339 (D.S.C. 1992) (prior decision of the district court), *vacated*, *SRAC v. Theodore*, 508 U.S. 968 (1993), and *Campbell v. Theodore*, 508 U.S. 968 (1993). After the governor's veto was sustained,

the court declared that the legislative process was deadlocked. App. 4. These cases were tried beginning in February, 1992. During the three week trial the parties submitted evidence probative of minority vote dilution and various remedial redistricting plans. App. 5.[2]

On May 1, 1992 the court issued an order concluding that none of the plans proposed by the parties fully satisfied constitutional and statutory mandates, and directed that court ordered legislative and congressional plans "shall be the lawful election districts for each of those bodies for the general elections scheduled for 1992, and for all subsequent elections until redistricting plans for those bodies are lawfully enacted by the South Carolina General Assembly." *Burton v. Sheheen*, 793 F.Supp. at 1369; App. 5.[3] The court's plans, which were put into effect as a result of the litigation initiated by petitioners, were used by the state for the 1992 elections for the senate, house, and Congress. Those elected, with the

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[2] At the senate phase of the trial, the Republican Party, SRAC, the senate, the lieutenant governor, and the governor presented plans for consideration by the court. Burton v. Sheheen, 793 F.Supp. at 1362. At the house phase of the trial, the Republican Party, SRAC, the house, the speaker of the house, and the governor presented proposed remedial plans. *Id.* at 1364 and n.72. At the congressional phase of trial the state defendants agreed with petitioners that a majority black congressional district could and should be drawn. *Id.* at 1368.

[3] The court's plan created ten majority black senate districts, compared to seven in the pre-existing plan, 23 majority black house districts, compared to 20 in the pre-existing plan, and, for the first time since Reconstruction, a majority black congressional district. Burton v. Sheheen, 793 F.Supp. at 1362, 1364 and n.72, and 1368.

exception of the senator from Senate District One, served out their full terms.

SRAC appealed the decision of the district court. It contended that the three judge court had not properly applied Section 2 in implementing its court ordered plans. *SRAC v. Theodore*, No. 92-155 (S.Ct.). The governor subsequently filed a similar appeal. *Campbell v. Theodore*, No. 92-219 (S.Ct.).

This Court vacated and remanded for "further consideration in light of the position presented by the Solicitor General in his brief for the United States filed May 7, 1993." *SRAC v. Theodore*, 508 U.S. at 968. The Solicitor General's position was that the district court erred in failing to conduct a full Section 2 review of its plans "before imposing those plans for use in future elections." *SRAC v. Theodore*, No. 92-155, Brief for the United States as Amicus Curiae, p. 18. The Solicitor General, acknowledging the electoral time constraints the district court faced, did not question the court's decision "to impose its plans in their current form for purposes of the 1992 elections." *Id.*

On remand, the district court provided the state an opportunity to enact legislative redistricting plans. App. 5. The general assembly enacted a new plan for the house in February, 1994 which drew heavily upon the court ordered plan. App. 10. Following an initial objection and subsequent modification, the plan was precleared by the Attorney General under Section 5 on May 31, 1994. App. 6. The legislative plan for the house increased the number of majority black districts compared to the court ordered plan from 23 to 31. S.C. Act 415, May 19, 1994. Neither the

Republican party nor SRAC challenged the precleared house plan. On March 28, 1994 the general assembly passed a new congressional plan which made only slight changes in the court ordered plan and retained a majority black district. The plan was precleared by the Attorney General on April 28, 1994. App. 6, 14. Neither SRAC nor the Republican Party challenged the precleared congressional plan.

The 1994 elections for the house and Congress were held under the legislatively enacted plans. The next regular election for the senate was scheduled for 1996.

In July, 1994, the senate moved the court to allow the state to hold a special election to fill a vacancy in Senate District One using the lines in the court ordered plan. SRAC and the Republican Party opposed the motion on the grounds that the state's decision to conduct the special election using the court ordered lines was a legislative decision subject to preclearance under Section 5. The district court agreed and ruled that the proposed special election plan "must be submitted for preclearance under Section 5." Order, August 22, 1994, slip op. at 12; App. 5-6. The state made a submission which was approved on December 12, 1994.

In May, 1995 the state enacted a legislative plan for the senate which was based substantially on the court ordered plan. App. 10. The plan was submitted to the Attorney General and was precleared. App. 6. The legislative plan for the senate increased the number of majority black districts compared to the court ordered plan from ten to 11. S. 9, Ratification No. 667 (1995). Neither

the Republican party nor SRAC opposed the precleared senate plan.

SRAC and the Republican Party filed separate motions for costs and fees as prevailing parties pursuant to 42 U.S.C. §§ 1973l(e) and 1988. The motions were denied by the district court and the denial was affirmed *per curiam* by the court of appeals. App. 8.

A. The Decision of the Court of Appeals.

The court of appeals, relying upon *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994) (*en banc*), rejected "'catalyst' analysis of causation in determining prevailing party status," and held that petitioners were not prevailing parties because they "were not entitled to enforce any judgment against the defendants." App. 7-8. According to the court of appeals, "neither the district court's vacated judgment, nor the Supreme Court's decision to remand to the district court for further consideration in light of the Solicitor General's brief constitutes an enforceable judgment against the defendants." App. 8.[4]

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[4] In *S-1 and S-2*, 21 F.3d at 51, the *en banc* court adopted the dissenting panel opinion of Judge Wilkinson in *S-1 and S-2*, 6 F.3d 160, 172 (4th Cir. 1993), in which he interpreted Farrar v. Hobby, 113 S.Ct. 566 (1992), as rejecting the catalyst theory of prevailing party status. Six members of the *en banc* court adopted the panel majority opinion, which noted that the Court in *Farrar* "never mentioned the catalyst theory, and the passage upon which the State relies occurs, as dicta, in a general discussion of 'prevailing party' status." 6 F.3d at 167.

Although petitioners secured an enforceable judgment against the defendants on their claim that special senate elections were required to be precleared under Section 5, the court of appeals denied a fee award for that portion of the litigation on the ground that petitioners' success "does not represent a 'material alteration in the relationship between the parties.' " App. 8.

In a concurring opinion, Judge Motz acknowledged that petitioners were "the 'catalyst' " for the action taken by the district court and subsequently the legislature. App. 10.

> SRAC and the Republican Party advance the classic 'but for' scenario: had it not been for the filing of their complaints in the district court, the court would not have intervened in the reapportionment process. Without such intervention, the South Carolina General Assembly would not have adopted a scheme that drew heavily from that judicially-crafted plan.

Id. Judge Motz joined the judgment because she was obligated to follow *S-1 and S-2*. App. 9 ("[n]o panel can refuse to follow a circuit precedent . . . established by the entire court sitting en banc"). She expressed doubt, however, that *Farrar v. Hobby*, 113 S.Ct. 566 (1992), required the same outcome, noting that the Fourth Circuit's "conclusion that *Farrar dicta* eviscerated the catalyst analysis was contrary to the view of every other circuit to address the question," and that "[i]n the three years since the issuance of *S-1 and S-2* no circuit has followed our holding." App. 10.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted because the decision of the Court of Appeals for the Fourth Circuit for which review is sought is squarely and irreconcilably in conflict with the decisions of all 11 of the other circuits which have addressed the issue of whether catalyst theory of causation is sufficient to support an award of attorney's fees under 42 U.S.C. §§ 1973l(e) and 1988.[5]

The opinion below is also contrary to the decisions of this Court for determining prevailing party status.

A. There Is a Conflict Among the Circuits.

Catalyst theory justifying an award of fees "requires showing that the lawsuit is a causal link that prompted some remedial action." *Fields v. City of Tarpon Springs*, 721 F.2d 318, 321 (11th Cir. 1983). *See also Nadeau v. Helgemoe*, 581 F.2d 275, 280 (1st Cir. 1978) ("[t]he key issue is the provocative role of the plaintiff's lawsuit"). Only the Fourth Circuit has rejected the catalyst theory.

In interpreting the fee statutes, catalyst theory has been applied by the following circuits:

First Circuit	*Nadeau v. Helgemoe*, 581 F.2d at 279 ("when plaintiff's lawsuit acts as a 'catalyst' in prompting defendants to take action to meet plaintiff's

[5] In Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983), the Court indicated that the standards for awarding fees under the two statutes are generally the same.

	claims, attorney's fees are justified despite the lack of judicial involvement in the result").
Second Circuit	*Gerena-Valentin v. Koch*, 739 F.2d 755, 758-59 (2d Cir. 1984) (plaintiffs may recover where the litigation was "a catalytic . . . factor" in obtaining relief).
Third Circuit	*Wheeler v. Towanda Area School District*, 950 F.2d 128, 132 (3d Cir. 1991) ("causation can be established through a 'catalyst' theory, where even though the litigation did not result in a favorable judgment, the pressure of the lawsuit was a material contributing factor in bringing about extra judicial relief").
Fifth Circuit	*Heath v. Brown*, 858 F.2d 1092, 1093 (5th Cir. 1988) (plaintiffs may recover where the litigation was a "significant catalyst in the abandonment of a policy which had been challenged as unconstitutional").
Sixth Circuit	*Perket v. Secretary of Health & Human Services*, 905 F.2d 129, 132 (6th Cir. 1990) (plaintiffs are prevailing parties who were a "catalyst" in prompting defendants to take action).

Seventh Circuit	*Dawson v. Patrick*, 600 F.2d 70, 79 (7th Cir. 1979) (applying "catalyst" analysis).
Eighth Circuit	*Truax v. Bowen*, 842 F.2d 995, 997 (8th Cir. 1988) (approving "the catalyst approach").
Ninth Circuit	*Lads Trucking Co. v. Board of Trustees*, 777 F.2d 1371, 1375 (9th Cir. 1985) (fees may be awarded "even though there is no judgment on the merits").
Tenth Circuit	*Luethje v. Peavine School District*, 872 F.2d 352, 354 (10th Cir. 1989) ("it is enough [for a fee award] that plaintiff's actions were a significant catalyst or a substantial factor in causing defendants to act").
Eleventh Circuit	*Fields v. City of Tarpon Springs*, 721 F.2d at 321 ("[t]o determine if a party has prevailed when there is no judicial relief this circuit has used the catalyst test").
D.C. Circuit	*Public Citizen Health Research Group v. Young*, 909 F.2d 546, 549 (D.C.Cir. 1990) (plaintiffs may recover as prevailing parties if the litigation was a causal factor in obtaining the relief sought).

Prior to *S-1 and S-2*, the Fourth Circuit itself recognized and applied the catalyst rule. *See, e.g., Smith v.*

University of North Carolina, 632 F.2d 316, 347 (4th Cir. 1980) (fees are authorized where "a plaintiff's actions were a catalyst which caused a defendant to remedy his errant ways"); *DeMier v. Gondles*, 676 F.2d 92, 93 (4th Cir. 1982) ("a settlement, consent decree, or other resolution of the underlying dispute short of formal adjudication may still support an award of fees").

Although the Court in *Hewitt v. Helms*, 482 U.S. 755, 761, 763 (1987), did not reach the catalyst theory, it recognized that fees can be appropriately awarded when a plaintiff secures some of the relief sought "despite the absence of a formal judgment in his favor." And in *Maher v. Gagne*, 448 U.S. 122, 129 (1980), the Court held that "[n]othing in the language of § 1988 conditions the District Court's power to award fees . . . on a judicial determination that the plaintiff's rights have been violated." *See also* S.Rep. No. 1011, 94th Cong. 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 ("parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief").

Farrar did not, as the court of appeals held, reject the catalyst theory. Instead, the Court recognized that a plaintiff could be a prevailing party under two different circumstances. The first was where the plaintiff "obtain[ed] an enforceable judgment against the defendant." 113 S.Ct. at 573. The second was where the plaintiff obtained "relief through a consent decree or settlement." *Id.* (*citing Maher v. Gagne*, 448 U.S. at 129). The court of appeals improperly ignored, or considered

redundant, the second basis for determining prevailing party status identified by this Court.[6]

The circuits, moreover, have continued to apply the catalyst rule since this Court's decision in *Farrar*, frequently expressly rejecting the position taken in *S-1 and S-2*. *See, e.g.*:

First Circuit	*Paris v. HUD*, 988 F.2d 236, 241 (1st Cir. 1993) (holding post-*Farrar* that plaintiffs were prevailing parties under the "catalyst" theory).
Third Circuit	*Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 547 (3d Cir. 1994) ("[t]he view that the 'catalyst theory' was *sub silentio* abrogated in *Farrar* is incompatible with the Supreme Court's approach to attorney's fees under section 1988").
Fifth Circuit	*Craig v. Gregg County Texas*, 988 F.2d 18, 20-1 (5th Cir. 1993) (applying the catalyst test).

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[6] Had the Court intended to overrule or depart from its holding in *Maher* that "[n]othing in the language of § 1988 conditions the District Court's power to award fees . . . on a judicial determination that the plaintiff's rights have been violated," it would surely have said so. *See* Vasquez v. Hillery, 474 U.S. 254, 266 (1986) ("the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons").

Sixth Circuit	*Brown v. Local 58, IBEW*, 76 F.3d 762, 772 (6th Cir. 1996) (approving the catalyst formulation); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-58 (6th Cir. 1993) (plaintiffs were prevailing parties where defendants made voluntary changes plaintiffs sought by their lawsuit).
Seventh Circuit	*Zinn By Blankenship v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994) ("plaintiffs who attain the relief they seek through defendants' voluntary action may qualify for fees by way of the catalyst theory notwithstanding *Farrar*").
Eighth Circuit	*Little Rock School District v. Pulaski County Special School District, No. 1*, 17 F.3d 260, 263 n.2 (8th Cir. 1994) (*Farrar* does not affect "our foregoing [catalyst] analysis").
Ninth Circuit	*Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995) ("the catalyst test survives *Farrar*").
Tenth Circuit	*American Council of the Blind, Inc. v. Romer*, 992 F.2d 249, 251 (10th Cir. 1993) (*Farrar* does not condemn "use of the 'catalyst rule' "); *Beard v. Teska*, 31 F.3d 942, 951 (10th

Cir. 1994) (rejecting the argument that *Farrar* repudiated catalyst theory).

The conflict among the circuits here is not only patent, but as the concurring opinion of Judge Motz makes clear, it cannot be resolved except by the action of this Court. The petition should be granted. *See McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on this issue of statutory construction"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (certiorari granted "to resolve a conflict among the Circuits"); *United States v. Gaddis*, 424 U.S. 544, 547 (1976) (certiorari granted "because of the discordant views in the Circuits regarding the proper application" of prior Supreme Court decisions).

B. The Opinion Below Is in Conflict with the Decisions of this Court for Determining Prevailing Party Status.

Petitioners were not only the catalyst for judicial and legislative action, as Judge Motz found, App. 10, but their success in this case was exceptional. They succeeded in breaking through the legislative impasse and in invalidating the pre-existing malapportioned legislative and congressional districting plans. They secured declaratory and injunctive relief in the form of court ordered legislative and congressional redistricting. The court ordered plans were a substantial improvement over the pre-existing plans and increased in each instance the number of majority black districts. Appellants secured injunctive

relief insuring that legislative and congressional elections were held in a timely manner in 1992.

The SRAC petitioners prevailed in their appeal to the Supreme Court and secured an order vacating the decision of the district court and remanding for further consideration of petitioners' Section 2 claims. Petitioners also secured an injunction preventing the implementation of a special election for Senate District One absent Section 5 preclearance.

As a result of the litigation, the general assembly enacted legislative and congressional plans which complied with one person, one vote. Moreover, the legislative plans for the house and senate, from the standpoint of minority political participation, were an improvement even over the court ordered plans.

According to the precedents of this Court, plaintiffs are deemed prevailing parties within the meaning of the fee statutes, 42 U.S.C. §§ 1973l(e) and 1988, "'if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 784, 790 (1989), the Court reaffirmed the *Hensley* formulation and unanimously rejected the contention that plaintiffs must prevail on the "central issue" in a case and achieve the "primary relief sought" in the litigation to be deemed prevailing parties. The search for the "central" issue and "primary" relief, "much like the search for the golden fleece, distracts the district court from the primary purposes behind § 1988

and is essentially unhelpful in defining the term 'prevailing party.' " 489 U.S. at 791. Instead, "[a] prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought." 489 U.S. at 791. According to the Court, the central inquiry is whether there was a "material alteration of the legal relationship of the parties." 489 U.S. at 792-93. *Accord, Hewitt v. Helms,* 482 U.S. at 761 (a plaintiff is prevailing who settles "some dispute which affects the behavior of the defendant towards the plaintiff").

The *Hensley* standard, described by the Court as "a generous formulation," 461 U.S. at 433, is designed to effectuate the intent of Congress in enacting the fee statutes "to ensure 'effective access to the judicial process' for persons with civil rights grievances." 461 U.S. at 429. *Accord, Texas State Teachers Association,* 489 U.S. at 793 ("Congress meant to promote [the role of 'private attorney general'] in enacting the Civil Rights Attorney's Fees Awards Act of 1976"). Applying the legal standards required by *Hensley* and *Texas State Teachers Association,* and mindful of the underlying congressional purpose in enacting the fee statutes, petitioners were prevailing parties. They succeeded not merely on "any" significant issue that achieved "some" of the benefit sought in bringing suit, but they achieved essentially all of the basic goals of their litigation.

Farrar v. Hobby further supports an award in this case. *Farrar* was an action in which the plaintiffs sought $17 million in money damages. Instead, the jury gave them nothing; they recovered only nominal damages in the amount of $1.00. While the Court held they were prevailing parties, plaintiffs were not entitled to an award

of fees because their victory was purely "technical." 113 S.Ct. at 574. However, as Justice O'Connor held in her concurring opinion, "[n]ominal relief does not necessarily a nominal victory make." 113 S.Ct. at 578. Recognizing that the fee statute "is a tool that ensures the vindication of important rights, even when large sums of money are not a stake," a court's analysis should take into account "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served." 113 S.Ct. at 579 (O'Connor, J., concurring).

In *Farrar* there was no evidence of any "public purpose this litigation might have served." 113 S.Ct. at 578 (O'Connor, J., concurring). In this case, by contrast, the litigation directly served the very important public purposes of insuring that elections were held in a timely manner under fairly apportioned redistricting plans, and that legislatively enacted plans were implemented. Under *Farrar*, these factors weigh heavily in support of a fee award.

The court of appeals failed to apply the standards for prevailing party status adopted by the Court in *Hensley* and *Texas State Teachers Association*. The petition should be granted because the lower court decided a federal question in conflict with the applicable decisions of this Court. *Army & Airforce Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982) (granting certiorari where the decision below "appeared to be in conflict with our precedents").

C. Petitioners' Success on their Section 5 Claim Was not Immaterial.

The court of appeals acknowledged that petitioners prevailed on their claim that the special senate election was subject to Section 5 preclearance. It held, however, that the victory "does not represent a 'material alteration in the relationship between the parties' such as to merit treatment as a 'prevailing party.' " App. 8. The court's ruling is in conflict with the decisions of this Court which have recognized the importance of Section 5 in protecting minority voting rights, as well as the crucial role played by private enforcement, and the decisions of other federal courts which have awarded attorney's fees to plaintiffs who have secured compliance with the statute.[7]

The Court in *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), upheld the constitutionality of Section 5 because of the exceptional history of voting discrimination in the jurisdictions covered by the statute and the critical role of preclearance. The Court noted the "unremitting and ingenious defiance of the Constitution" in certain sections of the country, the failure of the case-by-case method to end discrimination, and the "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination" which Section 5 was designed to pretermit. *Id.* at 309, 335.

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[7] The actual time spent on the Section 5 issue was a small part of the total litigation. But that does not mean, as the court of appeals held, that securing compliance with Section 5 was immaterial.

The Court has also stressed the importance of private enforcement of the Act, particularly Section 5. In *Allen v. State Board of Elections*, 393 U.S. 544, 554-57 (1969), the Court inferred a private cause of action to enforce Section 5 based on the Act's objective of protecting minority citizens from discrimination in voting, concluding that "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U.S. at 556.

In its 1975 amendments of the Act, Congress made explicit its intent that private citizens could enforce Section 5; it provided that every time "Attorney General" appeared in Section 3, the "pocket trigger," the words "Attorney General or any aggrieved person" should be substituted. 42 U.S.C. § 1973a(c); S.Rep. No. 295, 94th Cong., 1st Sess. 40 (1975) *reprinted in* 1975 U.S.C.C.A.N. 774, 807 ("it is sound policy to authorize private remedies to assist the process of enforcing voting rights"). The Senate report explained that in voting rights cases "Congress depends heavily upon private citizens to enforce the fundamental rights involved." S.Rep. No. 295 at 40. *See also Chisom v. Roemer*, 501 U.S. 380 (1991) (private action to enforce Section 2); *Morse v. Republican Party of Virginia*, 116 S.Ct. 1186, 1213 (1996) (recognizing a private cause of action to enforce Section 10 of the Act, 42 U.S.C. § 1973h).[8]

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[8] Private enforcement has proved indispensable to the effective implementation of the Act since its passage. *See* Chandler Davidson & Bernard Grofman, "The Voting Rights Act and the Second Reconstruction," in Quiet Revolution in the

Congress has extended Section 5 three times since its enactment in 1965 – in 1970, 1975, and in 1982. In the 1982 extension, Congress indicated that the gains in minority political participation "are fragile," and that "[w]ithout the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices." S.Rep. No. 417, 97th Cong., 2d Sess. 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 187. The Senate report noted the "virtual unanimity among those who have studied the record that Section 5 preclearance should be extended." *Id.* at 9 and 186.

In light of the strong congressional commitment to Section 5 preclearance, the statute's function in protecting minority voting rights, and the central role played by private enforcement in effectuating the Act's purposes, the court of appeals erred in concluding that petitioners' successful efforts in securing compliance with the statute were not "material."

When it extended Section 5 in 1975, Congress also amended the Act to authorize "a reasonable attorney's fee as part of the costs" to the prevailing party. 42 U.S.C. § 1973l(e). According to the Senate report, "[f]ee awards are a necessary means of enabling private citizens to vindicate these Federal [voting rights]." S.Rep. No. 295 at 40. To deny fees to a prevailing party, as here, would not only be contrary to the intent of Congress, but would improperly cast the burdens of litigation and delay upon

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South: The Impact of the Voting Rights Act, 1965-1990, 385 (Chandler Davidson & Bernard Grofman eds., 1994) (the private bar has had "a major role in enforcing public voting rights law . . . [t]his fact cannot be emphasized too strongly").

the victims of possibly discriminatory practices. *South Carolina v. Katzenbach*, 383 U.S. at 328.

Other lower federal courts, recognizing the importance of Section 5 enforcement, have awarded attorney's fees to plaintiffs who secured compliance with the statute even when the voting change was determined not to injure minority voting rights. In *Maloney v. City of Marietta*, 822 F.2d 1023 (11th Cir. 1987), the plaintiff was deemed a prevailing party entitled to a fee award because he succeeded in his action to require the city to comply with Section 5 in using an unprecleared ward residency requirement. Although the Attorney General precleared the requirement, the court awarded fees because the legislative history and the decisions of this Court provided that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 822 F.2d at 1026, *quoting* S.Rep. No. 295 at 40, 1975 U.S.C.C.A.N. at 807, and *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1986).

The court also concluded in *Maloney* that the plaintiff had protected important rights "guaranteed under the [Voting Rights] Act." *Id.*

> By enacting the Voting Rights Act and subsequent amendments, Congress has evidenced its determination that compliance with the Act's provisions is of importance in protecting minority race participation in government and government's response to the legitimate interests of minority citizens. Where there has been noncompliance, the actor whose litigation brings about compliance has protected important civil rights of minorities.

822 F.2d at 1026 n.5. *See also Arriola v. Harville*, 781 F.2d 506, 512 (5th Cir. 1986) (plaintiffs entitled to fees for securing an injunction against use of an unprecleared voting practice); *Brooks v. Georgia State Board of Elections*, 997 F.2d 857 (11th Cir. 1993) (awarding plaintiffs fees in successful effort to require state to submit new judgeships for preclearance); *Robinson v. Alabama State Department of Education*, 727 F.Supp. 1422, 1425 (M.D.Ala. 1989) ("fees for prevailing plaintiffs" are critical to Section 5 enforcement).

The decision of the court of appeals will weaken enforcement of the Voting Rights Act in all the jurisdictions located within the Fourth Circuit by making it more difficult for economically disadvantaged minorities to redress their grievances in the courts.[9] Further, it will undermine the private attorney general aspect of the fee statutes for other parties with important public issues. Such a result is at odds with the intent of Congress in enacting the fee statutes and of promoting the role of "private attorney general" in vindicating protected voting and other rights. *Texas State Teachers Association*, 489 U.S. at 793.

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[9] The states in the Fourth Circuit covered in whole or in part by Section 5 are Virginia, North Carolina, and South Carolina, states which Congress specifically found had histories of discrimination and "unremitting and ingenious defiance of the Constitution" in the area of voting rights. South Carolina v. Katzenbach, 383 U.S. at 309-10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE; WILLIAM GIBSON, Doctor; FREDERICK CALHOUN JAMES, Bishop; HERBERT WILLIAMS, Reverend; Willie B. Owens; South Carolina Conference of the NAACP Branches, *Plaintiffs-Appellants,* v. DAVID M. BEASLEY, in his official capacity as Governor of South Carolina; DAVID H. WILKINS, in his official capacity as Speaker of the South Carolina House of Representatives, *Defendants-Appellees,* THE SOUTH CAROLINA SENATE, *Intervenor.*	No. 96-1086

MICHAEL G. BURTON, as Executive Director on behalf of the Republican Party; WILLIAM P. COLLINS, III; EARL COPELAND; WILLIAM PATRICK FLACK; FRANK E. GIBSON, III; NANCY D. HAWK; GUS ROBERTS,

Plaintiffs-Appellants,

v.

DAVID M. BEASLEY, in his official capacity as Governor of South Carolina; DAVID H. WILKINS, in his official capacity as Speaker of the South Carolina House of Representatives,

Defendants-Appellees,

THE SOUTH CAROLINA SENATE,

Intervenor.

No. 96-1099

Appeals from the United States District Court of South Carolina, at Columbia.
Clyde H. Hamilton, Circuit Judge; G. Ross Anderson, Jr., District Judge; Falcon B. Hawkins, Senior District Judge.
(CA-91-3310-3, CA-91-2983-3)

Argued: September 24, 1996

Decided: October 30, 1996

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published per curiam opinion. Judge Niemeyer and Judge Motz wrote concurring opinions.

COUNSEL

ARGUED: Moffatt Laughlin McDonald, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., Atlanta, Georgia; Thomas Rush Gottshall, SINKLER & BOYD, P.A., Columbia, South Carolina, for Appellants. Kenneth Paul Woodington, Senior Assistant Attorney, General, Columbia, South Carolina, for Appellees. Fred Thompson, III, STOKES & THOMPSON, Charleston, South Carolina, for Intervenor. **ON BRIEF:** Dennis Courtland Hayes, Willie Abrams, NAACP SPECIAL CONTRIBUTION FUND, Baltimore, Maryland; John Roy Harper, II, Columbia, South Carolina, for Appellants. Charles Molony Condon, Attorney General, Treva G. Ashworth, Deputy Attorney General, Columbia, South Carolina, for Appellee Wilkins; Charles E. Carpenter, Jr., Frederick A. Crawford, Deborah M. Sheffield, RICHARDSON, PLOWDEN, GRIER & HOWSER, P.A., Columbia, South Carolina, for Appellee Beasley. Mark Packman, DICKSTEIN, SHAPIRO & MORIN, Washington, D.C.; Gedney Howe, III, Charleston, South Carolina, for Intervenor.

OPINION

PER CURIAM:

The Statewide Reapportionment Advisory Committee and the South Carolina Republican Party appeal the

denial of attorney's fees in this action brought pursuant to the Voting Rights Act. We affirm.

I.

In 1990, census figures indicated that congressional districts and state legislative districts were apportioned unconstitutionally. After the release of these figures, the South Carolina General Assembly established committees to craft new redistricting plans. Deliberations continued with no success prior to the adjournment of the legislative session in June, 1991.

On October 4, 1991, the South Carolina Republican Party instituted an action in federal court alleging that the existing plans were malapportioned and unconstitutional. The party sought a declaration that the legislative process was at an impasse, thereby allowing for judicial intervention. A few weeks later, the Statewide Reapportionment Advisory Committee ("SRAC"), an unincorporated association of private individuals and organizations, filed a similar suit. A three-judge court was constituted to hear the complaints pursuant to 28 U.S.C. § 2284, and the two cases were consolidated in November, 1991. *See Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992), *vacated, Statewide Reapportionment Comm. v. Theodore*, 508 U.S. 968 (1993), and *Campbell v. Theodore*, 508 U.S. 968 (1993).

In January 1992, the South Carolina Governor, Carroll A. Campbell, Jr., vetoed the plans passed by the General Assembly, requesting a plan with more majority black districts. When no further action was taken by February 1992, the three-judge court declared a legislative impasse,

and allowed proceedings to go forward. After a three week trial, the court rejected redistricting plans submitted by all parties, and adopted its own plan. The State followed this plan during 1992 state elections.

SRAC, on one hand, and the Governor, on the other, appealed the court's decision. SRAC asserted, *inter alia*, that the court had not properly applied the analysis required by § 2 of the Voting Rights Act, 42 U.S.C. §§ 1973 *et seq.*, in implementing the plans. (A § 2 review calls on a court to "assess the impact of the contested [plan] on minority electoral opportunities." *Burton*, 793 F. Supp. at 1349, citing *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986)). In response to the SRAC appeal, the Supreme Court vacated the lower court's judgment and remanded the case for "further consideration in light of the position presented by the Solicitor General in his brief for the United States filed May 7, 1993." *SRAC v. Theodore*, 508 U.S. 968 (1993). The Governor's appeal received an identical response. *Campbell v. Theodore*, 508 U.S. 968 (1993). Like SRAC, the Solicitor General had maintained that the three-judge court had failed to apply a proper § 2 analysis to the plans.

On remand, the three-judge court allowed the South Carolina General Assembly until August 1, 1995, to adopt state redistricting plans and preclear them with the Justice Department in accordance with the Voting Rights Act. Meanwhile, the Senate requested court approval to utilize the court-developed 1992 plans in a special October 1994 election for an open senatorial seat. SRAC and the Republican Party objected, arguing that these plans as well must be pre-cleared prior to their use in this election.

The court agreed with appellants and denied the Senate's motion.

By June 1995, the General Assembly had approved and pre-cleared plans for the reapportionment of both legislative houses as well as for congressional districts in the state. The court case was dismissed two months later. SRAC and the Republican Party subsequently moved for attorney's fees pursuant to 42 U.S.C. §§ 1973l(e) and 1988. The three-judge court denied that motion, and this appeal followed.

II.

The question for our review is whether SRAC and the Republican Party prevailed, as only prevailing parties are eligible for attorneys fees. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Supreme Court clarified the applicable standard:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff."

Id. at 111 (internal citations omitted).

This Court interpreted *Farrar*'s requirements in *S-1 and S-2 By and Through P-1 and P-2 v. State Bd. of Educ. of*

North Carolina, 6 F.3d 160 (4th Cir. 1993) (Wilkinson, J., dissenting), *vacated*, 21 F.3d 49, 51 (4th Cir.) (en banc) (adopting Judge Wilkinson's dissent as the majority opinion), *cert. denied*, 115 S.Ct. 205 (1994). There, parents of handicapped students brought an action, pursuant to 42 U.S.C. § 1983, against city and state officials for tuition reimbursement. The district court granted the plaintiffs summary judgment and the defendants appealed. *S-1 and S-2 v. Spangler*, 650 F. Supp. 1427 (M.D.N.C. 1986). After city officials agreed to reimburse tuition expenses, the parents continued to maintain their action against state officials. We held that the settlement with city officials mooted any action against state officials, and vacated the district court's grant of summary judgment to the plaintiffs against state officials. *S-1 and S-2*, 832 F.2d 294, 298 (4th Cir. 1987). On remand, the district court, recognizing the case's impact on state legislation, ordered that the state pay attorney's fees to the plaintiffs; a panel of this court affirmed. 6 F.3d 160.

Sitting en banc, a majority of this court reversed that decision. 21 F.3d 49. In doing so, the court rejected "catalyst" analysis of causation in determining prevailing party status. The court held that "[t]here is no way . . . that *Farrar* and a broad 'catalyst theory' of attorneys' fees recovery can be reconciled." 6 F.3d at 168-69 (Wilkinson, J., dissent) (adopted by majority opinion in *S-1 and S-2*, 21 F.3d at 51). Rather, the court concluded that the determinative factor would be a "material alteration of the legal relationship between the parties" as manifested by whether the plaintiff was entitled to enforce "a judgment, consent degree, or settlement against the defendant." *Id.* at 168-69 (quoting *Farrar*, 113 S.Ct. at 574).

Applying our holding in *S-1 and S-2* to the instant case, the court below determined that SRAC and the Republican Party did not meet the definition of "prevailing parties." Because the court's original decision was vacated by the Supreme Court, they were not entitled to enforce any judgment against the defendants. *Id.* at 169 ("[T]he judgment's vacatur on appeal renders it a legal nullity.").

We agree with the three-judge court's ruling. SRAC and the Republican Party fail to meet the standard set forth in *S-1 and S-2:* neither the district court's vacated judgement, nor the Supreme Court's decision to remand to the district court for further consideration in light of the Solicitor General's brief constitutes an enforceable judgment against the defendants. Similarly, the lower court's holding regarding preclearance of special election plans by the Justice Department does not represent a "material alteration in the relationship between the parties" such as to merit treatment as a "prevailing party." *Id.* at 168-69.*

Because SRAC and the Republican Party cannot establish that they meet the requirements set forth in *S-1 and S-2,* they are not entitled to attorney's fees.

AFFIRMED.

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* In passing, SRAC and the Republican Party suggest that an exception to *S-1 and S-2* be made for redistricting cases. But *S-1 and S-2* itself contains language rejecting such a carve-out. 6 F.3d at 169 n.2 (stating that a redistricting case, *Craig v. Gregg County,* 988 F.2d 18, 21 (5th Cir. 1993), "skirted the issue" as to the conflict between catalyst theory and *Farrar* and therefore was unpersuasive).

NIEMEYER, Circuit Judge, concurring:

To be a prevailing party in a legal action, a party must obtain relief in the action on the merits of his claim, *see Farrar v. Hobby*, 506 U.S. 103, 111 (1992), and not from some other process. The fee shifting statutes, such as 42 U.S.C. §§ 1973l(e) and 1988, reward successful *litigants*, not success in the political process even if the political success was a response to the litigation. Accordingly, in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.) (en banc) (adopting Judge Wilkinson's dissent at 6 F.3d 160 (4th Cir. 1993)), *cert. denied*, 115 S.Ct. 205 (1994), we rejected a broad catalyst theory for awarding attorneys fees to litigants simply because their position in litigation was vindicated by an external process or sequence of events outside of the litigation.

While I agree that *S-1 and S-2* requires us to affirm in this case, I believe the question of who prevailed, even when measuring the results obtained through the political process, is so unclear that whether we apply *S-1 and S-2* or evaluate who won in the political arena, I could not conclude that the district court abused its discretion in denying the appellants' attorneys fees.

DIANA GRIBBON MOTZ, Circuit Judge, concurring:

The parties have not established that they meet the "prevailing party" requirements of *S-1 and S-2*. No panel can refuse to follow a circuit precedent established by another panel, let alone one established by the entire court sitting en banc. Accordingly, I concur in the court's opinion and judgment.

I write separately only to indicate that I believe that the Supreme Court's holding in *Farrar* would not necessarily require the same outcome. I note that, when we issued *S-1 and S-2*, our conclusion that *Farrar dicta* eviscerated the catalyst analysis was contrary to the view of every other circuit to address the question. In the three years since the issuance of *S-1 and S-2* no circuit has followed our holding. Several have specifically disagreed with it. *See, e.g., Brown v. Local 58, IBEW*, 76 F.3d 762, 772 (6th Cir. 1996); *Beard v. Teska*, 31 F.3d 942, 951 (10th Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007 (9th Cir. 1995); *Zinn By Blankenship v. Shalala*, 35 F.3d 273, 275 (7th Cir. 1994). *See also Southeastern Fisheries Ass'n v. Chiles*, 876 F. Supp. 270, 271 (S.D. Fla. 1995).

Ironically, the "catalyst" analysis was devised to address cases like the one at hand. SRAC and the Republican Party advance the classic "but for" scenario: had it not been for the filing of their complaints in the district court, the court would not have intervened in the reapportionment process. Without such intervention, the South Carolina General Assembly would not have adopted a scheme that drew heavily from that judicially-crafted plan. Yet even if SRAC and the Republican Party did cause those results, *S-1 and S-2* forecloses this argument and requires that, without further ado, we conclude that they were not prevailing parties because they did not win an enforceable judgment against the defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

MICHAEL G. BURTON, as Executive Director and on behalf of the Republican Party, *et al.*, Plaintiffs, vs. ROBERT J. SHEHEEN, in his representative capacity as Speaker of the South Carolina House of Representatives, *et al.*, Defendants, ROBIN TALLON, NEIL A. VANDER LINDEN, FORREST E. OTT, PHILIP T. JONES, ANN Y. HART, PEGGY A. DUFEK, GWENDOLYN L. GROOMS, THE SOUTH CAROLINA SENATE, THE DEMOCRATIC PARTY OF SOUTH CAROLINA, Defendant-Intervenors.	C/A No. 3:91-2983-1

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*, Plaintiffs, vs. CARROLL A. CAMPBELL, JR., *et al.*, Defendants.	C/A No. 3:91-3310-1 (Filed Dec. 15, 1995)

These matters are before the court on petitions of plaintiffs, the South Carolina Republican Party and the Statewide Reapportionment Advisory Committee (SRAC), for attorneys' fees pursuant to 42 U.S.C. §§ 1973*l*(e) and 1988. For the reasons set forth below, the petitions are denied.

I

The facts of the underlying dispute are fully set forth in the court's order dated May 1, 1992. *See Burton v. Sheheen*, 793 F.Supp. 1329 (D.S.C. 1992), *vacated*, 113 S. Ct. 2954 (1993). To recapitulate briefly, the 1990 census figures, which were released in March of 1991, showed South Carolina's Senate, House, and congressional districts were unconstitutionally apportioned. From the point the census figures were released until the General Assembly adjourned *sine die* on June 6, 1991, both the Senate and the House wrestled, without success, to pass new redistricting plans. A concurrent resolution was introduced to extend the legislative session, but this resolution lacked the two-thirds majority needed for passage.

On October 4, 1991, the Republican Party instituted the underlying action claiming the existing Senate, House, and congressional plans were unconstitutionally apportioned. The Republican Party requested an injunction to prevent future use of those plans, a judicial determination that the redistricting process was at an impasse, and the adoption of the plans that it proposed.

On October 31, 1991, the SRAC filed a complaint substantially similar to the one filed by the Republican Party. The SRAC sought a judicial determination that the existing plans were unconstitutionally apportioned, that the existing plans could not be continued, and that the legislative process was at an impasse. In addition, the SRAC asked that its case be consolidated with the Republican Party's case. Consolidation was ordered November 13, 1991.

Shortly after reconvening on January 14, 1992, the General Assembly passed new Senate (S. 1003) and House (H. 3435) redistricting plans. These plans were vetoed by Governor Carroll A. Campbell, and the vetoes were upheld. The Governor's veto messages encouraged the General Assembly to draw more majority black districts in both S. 1003 and H. 3435 and to enhance the majority black districts which had been drawn in S. 1003. The General Assembly never passed a congressional plan.

No further plans were passed by the General Assembly. On February 10, 1992, the court convened a status conference at which all parties agreed that the legislative process was at an impasse with respect to redistricting. Pending motions were resolved and trial procedures were set. Trial ensued and the court ultimately fashioned its

own plans after concluding that "none of the plans proposed . . . fully comports with the objectives and criteria which should be incorporated in a judicially approved plan."

The SRAC appealed the court's order to the Supreme Court. The Court vacated the judgment of this court and remanded the case to this court for "further consideration in light of the position presented by the Solicitor General in his brief for the United States filed May 7, 1993." *SRAC v. Theodore,* 113 S. Ct. 2954 (1993). Essentially, the Supreme Court wanted a § 2 analysis to be performed. However, the Supreme Court did not vacate the elections based on the court's plans. This court then afforded the "legislative process" of the State of South Carolina until August 1, 1995 to adopt and preclear a districting plan for the Senate.

Shortly thereafter, on February 2, 1994, the General Assembly passed H. 4333 Act #284 of 1994, which legislatively reapportioned the S.C. House of Representatives. That Act was not signed by the Governor but became law on February 15, 1994. On May 31, 1994, the plan received preclearance by the Department of Justice (DOJ).

On March 28, 1994, the General Assembly ratified H. 4332, which legislatively reapportioned the congressional districts in a slightly different manner than the court-drawn plan. H. 4332 became law on March 29, 1994 without the Governor's signature. On April 28, 1994, the congressional plan was precleared by the DOJ.

Also in 1994, the Lieutenant Governor ordered a special election to replace Senator Alexander S. Macaulay in Senate District One. Senator Macaulay's position

opened when he was elected to the South Carolina judiciary as a Circuit Judge by the General Assembly. On July 20, 1994, the Senate requested an order from this court directing the use of this court's 1992 district lines for use in the special election. The Republican Party and the SRAC, among others, asked this court to require the state to preclear the use of the 1992 plan with the DOJ. This court agreed and on August 22, 1994, ordered the plan to be submitted for preclearance under § 5 of the Voting Rights Act. The plan was submitted to the DOJ and was eventually precleared on December 12, 1994.

Subsequently, S. 9 Act #49 of 1995, which reapportioned the South Carolina Senate, passed both Houses on May 11, 1995. This Act became law on May 18, 1995 without the Governor's signature. The underlying plan was precleared by the DOJ on May 30, 1995.

Against this backdrop we are asked to award attorneys' fees to the Republican Party and the SRAC under 42 U.S.C. §§ 1973*l*(e) and 1988.

II

We first turn to the standards for determining when a plaintiff can be awarded attorneys' fees. Here, the plaintiffs have moved for attorneys' fees under 42 U.S.C. §§ 1973*l*(e) and 1988.[1] Because the statutes contain nearly

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[1] 42 U.S.C. § 1973*l*(e) states the following:

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing

identical language and because the legislative intent was to have the same standards apply to both fee awards, this court shall construe the statutes similarly and shall apply the case law interpreting one statute to the other statute. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Hastert v. Illinois State Bd. of Election Comm'rs*, 28 F.3d 1430, 1439 n.10 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 429 (1994); *Bly v. McLeod*, 605 F.2d 134, 138 (4th Cir. 1979) ("§§ 1973*l*(e) and 1988 are phrased in identical terms, and we apply the same rule of decision under both of them.") *cert. denied*, 445 U.S. 928 (1980).

"Congress intended to permit the . . . award of counsel fees only when a party has prevailed on the merits." *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 572 (1992) (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (*per curiam*). " '[T]he fee applicant bears the burden of establishing entitlement to an award[,]' " and the district court has discretion in determining the amount of the fee award. *Alexander v. Mayor & Council*, 953 F.2d 160, 161 (4th Cir.1992) (quoting *Hensley*, 461 U.S. at 437). " 'This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding

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party . . . a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988, which was patterned in part upon § 1973*l*(e), similarly states the following:

> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part the costs."

frequent appellate review of what are essentially factual matters.' " *Id.* (quoting *Hensley,* 461 U.S. at 437).

"[I]n order to qualify for attorney's fees under § 1988 [or § 1973*l*(e)], a plaintiff must be a 'prevailing party.' " *Farrar,* 113 S. Ct. at 572. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792-793 (1989). "[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." *Farrar,* 113 S. Ct. at 573 (citations omitted). It is "[o]nly under these circumstances [that] civil rights litigation effect[s] the material alteration of the legal relationship of the parties' and thereby transform[s] the plaintiff into a prevailing party." *Id.* at 573 (quoting *Garland,* 489 U.S. at 792-793).

If the plaintiffs are found to be prevailing parties, the issue of attorneys' fees must be considered. As a proviso, the court cautions that "a determination that a party has 'prevailed' . . . means only that fee claimants are eligible for attorneys' fees. The court must then consider whether a fee award would be 'unjust' under the particular circumstances." *Commissioners Court v. United States,* 683 F.2d 435, 442 (D.C. Cir. 1982). *See also Farrar,* 113 S. Ct. at 577 (O'Connor, J., concurring) (finding the fee award statutes "expressly grant[ ] district court's discretion to withhold attorney's fees from prevailing parties in appropriate circumstances"). Therefore, we will address the question of attorneys' fees only if the plaintiffs are found to be prevailing parties.

III

A

As an initial matter, we must determine the effect of *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir.) (*en banc*), *cert. denied*, 115 S. Ct. 205 (1994), on this case. We find that as a matter of law the plaintiffs cannot be considered prevailing parties because an enforceable judgment against the defendants no longer exists.

The plaintiffs initially obtained a judgment on the merits of their claims, *see Burton v. Sheheen*, 793 F.Supp. 1329 (D.S.C. 1992), but that judgment is no longer enforceable because the Supreme Court vacated it. *SRAC v. Theodore*, 113 S. Ct. 2954 (1993). "The judgment's vacatur on appeal renders it a legal nullity." *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 169 (4th Cir. 1993) (Wilkinson, J., dissenting), *vacated*, 21 F.3d 49, 51 (4th Cir.) (*en banc*) (adopting Judge Wilkinson's dissent as the majority opinion), *cert. denied*, 115 S.Ct. 205 (1994). But the result of the vacatur was somewhat less than clear. Although the Supreme Court vacated and remanded the judgment of this court, the Court neither vacated the lines drawn by this court nor the elections held pursuant to the 1992 plans. Nonetheless, after the Court's action, the plaintiffs could no longer enforce this court's initial order.

The Republican Party specifically claims that its lawsuit acted as a catalyst in bringing about redistricting. But in *S-1* the Fourth Circuit Court of Appeals rejected the catalyst theory as a means of determining who is a prevailing party. Significantly, the court found that " '[n]o material alteration of the legal relationship between the parties occurs *until* the plaintiff becomes entitled to

enforce a judgment, consent decree, or settlement against the defendant.' " *S-1*, 6 F.3d at 168 (Wilkinson, J., dissenting) (quoting *Farrar*, 113 S. Ct. at 574). Since no enforceable judgment, consent decree, or settlement exists against these defendants, we are precluded from finding that the plaintiffs are prevailing parties.

B

We, however, are aware that the Fourth Circuit's reasoning has not been shared by the other Circuit Courts of Appeals.[2] In light of this split of authority, we additionally find that the plaintiffs would not be entitled to attorneys' fees under any theory because their successes were only technical or *de minimis*.

As noted above, the Republican Party and the SRAC essentially sought four objectives: (1) a determination that the existing Senate, House, and congressional plans were unconstitutionally apportioned, (2) an injunction to prevent future employment of those plans, (3) a determination that the legislative process was at an impasse, and (4) adoption of the plans proposed by them for the three legislative bodies.

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[2] *See, e.g., Marbley v. Bane*, 57 F.3d 224, 233-35 (2nd Cir. 1995); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Zinn by Blakenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 544-50 (3rd Cir. 1994).

1

Issues (1) and (2) were conceded by the defendants through their answers to the complaint and, before that, through the establishment of both Senate and House subcommittees to draw new plans even before the 1990 census figures were released. Thus, the issue of whether the existing plans were constitutional was the issue never in dispute before this court. Further, this issue consumed virtually none of the court's time, in either the pre-trial or trial stages, and was effectively dealt with in the court's order by a footnote. *See Burton*, 793 F.Supp. at 1336 n.2. It cannot be credibly asserted that the underlying litigation resulted from a dispute over the viability of the existing plans. Similarly, since all parties agreed the existing plans were unconstitutionally apportioned, it strains reason to suggest the issue of whether these plans could continue to be employed was a significant one. If the only issues in this litigation had been the condition of the existing plans and their fitness for continued use, the nearly three week trial which this court presided over could have been effectively reduced to a one hour hearing, if that. Since the issues of the viability of the existing plans and their appropriateness for continued use were not significant issues, the plaintiffs cannot be considered prevailing parties under the standards set forth in *Farrar* requiring a party to succeed on a significant issue.

2

Next, the plaintiffs claim prevailing party status on the issue of impasse. On this issue we conclude that the plaintiffs did not prevail. As mentioned above, the

Republican Party's complaint, filed October 4, 1991, sought an immediate judicial determination that the legislative process was irretrievably deadlocked. The SRAC requested an identical finding in its complaint filed October 31, 1991. The defendants denied the legislative process was deadlocked and moved to have the complaint dismissed on the ground of ripeness. On February 10, 1992, the impasse issue was resolved by a court order declaring an impasse, to which both parties consented.

At the time of the Republican Party's request, there still existed some possibility of a legislative resolution of the redistricting process when the General Assembly reconvened in January. As the Supreme Court stated in *Wise v. Lipscomb:*

> [R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt.
>
> . . . .
>
> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan . . . .
>
> 437 U.S. 535, 539-540 (1978) (citations omitted).

Thus, "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an opportunity to do so." *White v. Weiser,* 412 U.S. 783, 794-795 (1973) (quoting *Reynolds v. Sims,* 377 U.S. 533,

586. (1964)). Therefore, in October of 1991, South Carolina's redistricting process was not technically at an impasse because the process still held some hope of a legislative solution.

With an eye toward affording the legislature every opportunity to perform its redistricting responsibilities, this court postponed a decision on the request for a finding of impasse until January of 1992 and later to February of that same year. In the interim, plans for the Senate and House were passed, but vetoed by the Governor and those vetoes were sustained. No congressional plan was passed. Thus, it is imminently reasonable to conclude South Carolina's attempt at redistricting itself was not at an impasse in October of 1991 since a legislative resolution could be achieved as evidenced by the discernable, although not dispositive, process made by the General Assembly after their return in January of 1992.

We are therefore confronted with the question of whether the parties' agreement and subsequent court finding of impasse on February 10, 1992, qualifies the plaintiffs as prevailing parties. We find that the resolution of the impasse issue was a procedural finding amounting to little more than a determination of ripeness by the court. At most, our finding that an impasse existed was an interlocutory ruling that allowed the case to proceed to trial at the time it did. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (denying attorney's fees when "[t]he most that [the plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim"). Our finding that an impasse existed in no way affected the merits. In fact, the

finding of impasse was purely a procedural victory opening the door that eventually led to a rejection of the plans proposed by the plaintiffs. Therefore, because the impasse issue was not significant and the agreement failed to change the legal relationship between the plaintiffs and the defendants, we find that the plaintiffs are not prevailing parties on the impasse issue.

Furthermore, although a meaningful participant in other areas of this litigation, the SRAC was not the motivating force behind the court's finding of impasse. The eventual resolution of the impasse issue was dictated and determined by the court and the calendar more so than by the efforts of one of the parties. The SRAC was not the first party to raise the impasse issue or seek relief. Instead, the SRAC merely joined in the Republican Party's argument. In this court's considered opinion, the fee statutes were not passed to compensate parties who perfunctorily join in motions, particularly when the motions in question are of procedural import in the first instance. In addition, since the Republican Party is not a prevailing party on the issue of impasse, it would defy logic to find that the SRAC was a prevailing party.

3

Finally, the plaintiffs claim prevailing party status on the basis of the plans which eventually emerged from this process. In particular, the Republican Party claims to have been a catalyst in the court's decision to draw a minority opportunity district in South Carolina's Sixth Congressional District. None of the parties, however,

opposed the creation of some form of minority opportunity district in South Carolina. In fact, every plan offered at trial, including defendants', contained such a district.

Similarly, the SRAC claims it is entitled to fees as a prevailing party for the adoption of new plans for the Senate, House, and Congress irrespective of authorship. Specifically, counsel for the SRAC states the court "has granted Plaintiff[ ] SRAC relief on a significant issue presented in this litigation by adopting and creating plans for the redistricting of South Carolina's Senate, House of Representatives, and congressional districts. It is clear, therefore, that Plaintiff[ ] SRAC has prevailed in this action and achieved significant relief." SRAC's Petition for Attorneys' Fees at 3. This is certainly a curious explanation of the process in light of the fact that the SRAC appealed the very order which redistricted the state's legislative bodies. Either the SRAC was dissatisfied with the court's plans, which would raise doubts about its alleged "prevailing party" status, or its initial objective was merely for new plans to be drawn irrespective of authorship, which makes the SRAC's complaint superfluous since the Republican Party had already filed suit requesting new plans.

The obvious motive and goal of the plaintiffs was to get their plan adopted by the court. As this court made abundantly clear in the underlying order, the plans presented by the parties suffered a myriad of infirmities. In addition, we emphasized the plans we fashioned were

our own and did not remotely resemble the plans proposed by either plaintiff.[3] The only factors the court considered in fashioning its plan for South Carolina's Congressional districts were the federal and statutory requirements for congressional plans and South Carolina's state policies, provided those policies were consistent with the federal requisites. In truth, the testimony heard by the court was of little help in creating its plan. It should be noted the Republican Party proposed no Congressional plan and instead supported the plan offered by Governor Campbell. Thus, it cannot be credibly asserted that the plaintiffs "prevailed" in the creation of the interim plans this court ordered or more specifically, that the Republican Party prevailed in this court's creation of a minority opportunity district.

IV

The plaintiffs next contend that they have prevailed in litigation concerning the special election to replace Senator Macaulay in Senate District One. We agree.

As mentioned above, in 1994 a special election was ordered to replace Senator Macaulay in Senate District One. On July 20, 1994, the Senate requested a court order that the court-drawn lines used in 1992 also be used in the special election. The plaintiffs asked the court to

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[3] While this court does not find the plaintiffs to be prevailing parties on this issue, the court does not adopt the reasoning in *Hastert v. Illinois State Bd. of Election Com'rs*, 28 F.3d 1430 (7th Cir. 1993). In *Hastert*, the Seventh Circuit held that the touchstone for whether a party prevails is whether their map is ultimately adopted. *Id.* at 1443.

require the state to obtain preclearance of the 1992 lines from the DOJ. The Senate argued that court-drawn plans did not require preclearance under § 5 of the Voting Rights Act. The plaintiffs took the position that the adoption of the court's plan by the Senate was an act of legislative judgment, and therefore, the party-sponsored plan had to be submitted to the DOJ for preclearance, even if that plan adopted a prior court-ordered plan. The plan was submitted and received preclearance from the DOJ on December 12, 1994.

We are now faced with the question of whether the plaintiffs' success in obtaining a court order requiring preclearance of the 1992 district lines qualifies the Republican Party and the SRAC as prevailing parties. We find that the plaintiffs' success on this issue does qualify them as prevailing parties. Pursuant to *Farrar*, a prevailing party "must obtain an enforceable judgment against the defendant from whom fees are sought . . . " *Farrar*, 113 S. Ct. at 573 (citing *Hewitt*, 482 U.S. at 760). Here, the court order requiring the Senate to obtain preclearance was enforceable by the Republican Party and the SRAC.

In light of the DOJ's subsequent preclearance of the plan, the plaintiffs' victory was pyrrhic at best. While the plaintiffs were successful in having the plan submitted for preclearance, the election ultimately was conducted pursuant to the 1992 plan. The court recognizes that the plaintiffs still qualify as prevailing parties, but cautions that "although the 'technical' nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded." *Farrar*, 113 S. Ct. at 574.

V

The SRAC also has prevailed on another aspect of this litigation. On May 22, 1992, the SRAC filed a notice of appeal to the Supreme Court seeking review of the districting plan ordered by this court. On June 14, 1993, the Supreme Court vacated this court's judgment and remanded the case to this court for "further consideration in light of the position presented by the Solicitor General in his brief for the United States filed May 7, 1993." *SRAC v. Theodore,* 113 S.Ct. 2954 (1993). But the result of the vacatur was somewhat less than clear.

While the Supreme Court vacated and remanded the judgment of this court, the Court did not expressly vacate the lines drawn by this court. In addition, the elections held pursuant to the 1992 plans were not vacated. Thus, the net result of the SRAC's appeal was that the judgment was vacated, but all actions conducted pursuant to the judgment were untouched.

Nevertheless, the SRAC did prevail in having the judgment vacated. Even though the effect that vacating the judgment would have on the parties was unknown at the time, the SRAC had obtained an enforceable judgment. As such, remanding the case for further consideration in light of the Solicitor General's position was a direct benefit for the SRAC. Indeed, according to *Farrar,* this success qualifies the SRAC as a prevailing party as "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment." 113 S. Ct. at 573. Therefore, while the benefit was minor, it was sufficient to qualify the SRAC as a prevailing party on this issue.

VI

In summary, this court finds that: (1) both the Republican Party and the SRAC are prevailing parties on the litigation surrounding Senate District One, and (2) the SRAC is a prevailing party for obtaining the Supreme Court order vacating our judgment in *Burton v. Sheheen*. Having found the plaintiffs to be prevailing parties, the issue of attorneys' fees must be considered. The court cautions that "a determination that a party has 'prevailed' . . . means only that fee claimants are eligible for attorneys' fees. The court must then consider whether a fee award would be 'unjust' under the particular circumstances." *Medina*, 683 F.2d at 442. The fee award statutes "expressly grant[ ] district courts' discretion to withhold attorney's fees from prevailing parties in appropriate circumstances." *Farrar*, 113 S. Ct. at 577 (O'Connor, J., concurring). Indeed, 42 U.S.C. § 1973*l*(e) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."

The " 'most critical factor' in determining the reasonableness of a fee award 'is the success obtained' " by the prevailing party. *Farrar*, 113 S. Ct. at 574 (quoting *Hensley*, 461 U.S. at 436). As stated above, while "the 'technical' nature of a nominal damages award, or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded." *Id.* As such, "in some circumstances, even a plaintiff who formally 'prevails' . . . should receive no attorney's fees at all." *Id.* at 575. Therefore, the court must examine the overall success of the Republican Party and the SRAC as "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award. *Id.* at 574.

A

Both the Republican Party and the SRAC prevailed in the litigation surrounding Senate District One. Upon review, this victory is *de minimis* or pyrrhic at best. The outcome of that dispute was that the court required the Senate to submit the 1992 districting plans to the DOJ for preclearance. While the plaintiffs were successful in obtaining the submittal, the fact that the DOJ precleared those very same 1992 lines for use in the special election makes the plaintiffs' success facial and *de minimis*.

B

In addition, the SRAC's success in obtaining a Supreme Court order vacating our order and remanding the case to this court for further consideration is also merely technical and *de minimis*. In essence, what the SRAC achieved was a situation where the Supreme Court's order vacated the judgment, but left undisturbed the actions performed under the judgment. Indeed, the Supreme Court did not invalidate the 1992 Senate elections held pursuant to the vacated court order. And, in addition, the period whereby the court-drawn plan ceased to exist was short-lived. In 1994, the General Assembly passed a House of Representatives' act which became law and later was precleared for use by the DOJ. Also in 1994, a plan for the congressional districts was passed and precleared. Then, in 1995, a Senate Act became law and was also precleared. In the meantime, as evidenced in the Senate District One litigation, the DOJ precleared the 1992 plans for use in various elections.

Therefore, the SRAC's success as a prevailing party was purely technical in nature and *de minimis*.

The court admits that "prevailing plaintiffs 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " *Hastert*, 28 F.3d at 1439. (quoting S. Rep. 925, 94th Cong., 1st Sess. 40 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 807 (addressing § 1973*l*(e)); S. Rep. 1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (addressing § 1988)). However, in this case the *de minimis* nature of the plaintiffs' success is undeniably a special circumstance. As Justice O'Connor stated in her concurring opinion in *Farrar*, "When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded." 113 S. Ct. at 576. Indeed, " 'a technical victory may be so insignificant' . . . as to be insufficient to support an award of attorney's fees." *Id.* (quoting *Garland*, 489 U.S. at 792). Therefore, upon consideration of the technical and unremarkable success of the prevailing plaintiffs the court is compelled to award no attorneys' fees to either the Republican Party or the SRAC.

After evaluating the magnitude, or lack thereof, of the prevailing parties' success, "the court may lawfully award low fee or no fees without reciting the 12 factors bearing on reasonableness or multiplying 'the number of hours reasonably expended . . . by a reasonable hourly rate.' " *Id.* at 575 (quoting *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939). In addition, Justice O'Connor has stated:

> As a matter of common sense and sound judicial administration, it would be wasteful indeed to require that courts laboriously and mechanically go through those steps when the *de minimis*

> nature of the victory makes the proper fee immediately obvious. Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to 'award low fees or no fees' at all.
>
> *Id.* at 576 (quoting *Id.* at 575).

In this case, the above discussion explains why we find the success of the plaintiffs to be *de minimis*. For those reasons stated, we find that the reasonable fee is no fee at all.

VII.

To conclude, we find that neither the Republican Party nor the SRAC are entitled to attorneys' fees pursuant to 42 U.S.C. §§ 1973*l*(e) and 1988. While each plaintiff was a prevailing party on minor issues, their success was too technical or *de minimis* to justify an award of attorneys' fees. Therefore, the petitions of the Republican Party and the SRAC for attorneys' fees must be denied.

IT IS SO ORDERED this 15th day of December, 1995 at Columbia, South Carolina.

ENTERED for the court, with the concurrence of Judge Anderson and Judge Hawkins.

/s/ Clyde H. Hamilton
CLYDE H. HAMILTON
UNITED STATES
CIRCUIT JUDGE
FOURTH CIRCUIT COURT
OF APPEALS

Supreme Court, U.S.
FILED
FEB 28 1997
CLERK

No. 96-1201

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE; WILLIAM GIBSON, Doctor; FREDERICK CALHOUN JAMES, Bishop; HERBERT WILLIAMS, Reverend; WILLIE B. OWENS; SOUTH CAROLINA CONFERENCE OF THE NAACP BRANCHES; MICHAEL G. BURTON, as Executive Director on behalf of the Republican Party; WILLIAM L. COLLINS, III; EARLY COPELAND; WILLIAM PATRICK FLACK; FRANK E. GIBSON, III; NANCY D. HAWK; and GUS ROBERTS,

Petitioners,

versus

DAVID M. BEASLEY, in his official capacity as Governor of South Carolina; DAVID H. WILKINS, in his official capacity as Speaker of the South Carolina house of Representatives, and THE SOUTH CAROLINA SENATE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether plaintiffs in a reapportionment case were prevailing parties for the purposes of an attorneys' fee award when their reapportionment plan was rejected by a three-judge district court and the state legislature subsequently adopted a plan of its own without further substantive action by the three-judge court?

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No. 96-1201

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

Respondents Beasley and Wilkins respectfully submit this

Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed on January 28, 1997 by Petitioners Statewide Reapportionment Advisory Committee, et al.

COUNTERSTATEMENT OF THE CASE

This matter arises out of Petitioners' claim for almost $570,000 in attorneys' fees. Almost all of that amount was incurred in advancing reapportionment plans which the district court emphatically rejected.

The underlying litigation consisted of two separate reapportionment actions consolidated below and on appeal. The first of the two cases was filed on October 4, 1991, by Michael G. Burton, Executive Director of the South Carolina Republican Party, and others. The principal defendants were the presiding officers of the South Carolina Senate and House of Representatives and the Governor.[1]

The second case was filed several weeks later on October 31, 1991, by the self-styled Statewide Reapportionment Advisory Committee (SRAC), the South Carolina State Conference of the NAACP, and four individual black citizens.

Both cases sought a declaration of the obvious fact that the districts (House, Senate and Congressional) drawn according to the 1980 Census were no longer constitutional under the 1990 Census. Both cases also sought a declaration

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[1] This brief was prepared entirely by counsel for Appellee Wilkins. Counsel for Respondent David Beasley requested that this brief contain the following statement, representing the position of Governor Beasley in this appeal in his official capacity as Governor of South Carolina:

> The Office of the Governor takes a neutral position on the issues involved in this appeal and does not assert arguments for or against the relief sought in the appeal but leaves the matter to the discretion and judgment of the Court.

that the legislative process was deadlocked, and as a remedy asked that court-ordered plans be imposed in order for the 1992 elections to be held on schedule.

The South Carolina General Assembly had opportunities in both 1991 and early 1992 to enact reapportionment plans, but was unsuccessful in so doing. House and Senate plans passed both houses in January 1992, but were vetoed by the Governor, and the vetoes were not overridden. Each house passed a different Congressional plan, but neither obtained the approval of the other house.

In January 1992, the district court entered a scheduling order stating that the issue of legislative deadlock would be heard in February 1992, with a hearing on the parties' submitted plans to begin several days later. The trial before the three-judge panel began on February 19, 1992, and concluded on March 6, 1992. At the hearings, the parties presented their positions as to the appropriate size, location and shape of the reapportioned districts. Also in February 1992, all parties agreed that a legislative impasse existed.

On May 1, 1992, the court issued an order rejecting the plans proposed by the plaintiffs (and the defendants as well), and instead ordering the use of plans of the court's own fashioning in the 1992 elections and until the South Carolina General Assembly adopted lawful plans of its own. *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992)(three-judge court). As the court later noted, "the plans presented by the parties suffered a myriad of infirmities" and the court's plans "did not remotely resemble the plans presented

by either plaintiff." Pet. App. 24-25.[2]

A separate question from the factual nature of the plans was the issue of whether the court's plans should be reviewed under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. While the court applied some aspects of Section 2 analysis to its plan, it held that the substantive standards of Section 2 need not be fully imported into this case. 793 F. Supp. at 1351.

Appeals to this Court were taken by SRAC and by Governor Campbell, whose proposed plan was similar to that put forth by the Republican Party. The Republican Party was not an appellant when the case was taken to this Court. Both appellants argued that the three-judge court erred in not approving their respective plans; they also argued that full Section 2 analysis should be applied, a point that was supported by the Justice Department in an amicus brief invited by this Court. During the pendency of the appeal of the court's plan, the 1992 elections were held using the plan which the court had drawn.

On June 14, 1993, this Court issued the following order regarding the SRAC and Campbell appeals:

> The judgment is vacated and the cases are remanded to the United States District Court for the District of South Carolina for further consideration in light of the position presented by the Solicitor General in his brief for the United

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[2] The court had noted in 1992 with respect to the plaintiffs' respective plans for the House that "the Republican Party and the Governor appear to seek to eliminate Democrats and the SRAC appears to seek to eliminate incumbents because of their race." 793 F. Supp. at 1364.

States filed May 7, 1993.

Campbell v. Theodore, 113 S.Ct. 2954 (1993). [3]

On remand, with no elections scheduled for the near future, the court permitted the General Assembly additional time to enact redistricting plans. By the end of May 1994, plans for the House and the Congressional districts had been enacted by the General Assembly and precleared by the Justice Department within the timeframe permitted by the court. Senate districts were reapportioned by legislation passed in 1995 and precleared on May 30, 1995, also within the timeframe permitted by the court.

The normal years for Senate elections were 1992 and 1996, but in the meantime, before the General Assembly's Senate plan had been enacted and precleared, a Senate seat came open. The Senate sought the permission of the three-judge court to use the court's 1992 district lines for this special election. Holding that this motion by the Senate was "a proposal reflecting the policy choices of the elected representatives of the people" under *McDaniel v. Sanchez*, 452 U.S. 130, 152 (1981), the court in August 1994 ordered that the court's plan for Senate District 1 be submitted for preclearance under Section 5. The Republican Party and SRAC had argued that preclearance should be required.

The Justice Department precleared the court's plan on December 12, 1994. See Pet. App. 2C. However, as the court later noted, the plaintiffs' victory was "pyrrhic at best," Pet. App. 26, because the result of obtaining preclearance

[3] The order in *SRAC v. Theodore*, also at 113 S.Ct. 2954, is identical.

was that the Justice Department approved part of the 1992 court plan for the Senate which plaintiffs had strenuously opposed.

Shortly after the entry of the original 1992 order containing the court's plan, the Republican Party moved for attorneys' fees under the statutes providing for such fees in civil rights and voting rights cases. SRAC filed a similar motion shortly thereafter.

The court did not consider attorneys' fees until the case ended, i.e. when the last of the legislatively-enacted plans was precleared in May 1995. On August 16, 1995, the three-judge court dismissed the cases. Additional briefs and supplemental affidavits were received on the issue of attorneys' fees. The total amount claimed by counsel is $569,153.

On December 15, 1995, the district court issued an order denying all motions for attorneys' fees by plaintiffs SRAC and the Republican Party. On plaintiffs' appeal to the Court of Appeals for the Fourth Circuit, that court, citing *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) and *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994)(en banc), *cert. denied*, 115 S.Ct. 205 (1994), held that none of the results in the district court constituted an enforceable judgment, consent decree or settlement or a "material alteration in the relationship between the parties." Pet. App. 7-8.

REASONS FOR DENYING THE WRIT

A. *The decision below correctly applied this Court's precedents.*

It is readily apparent that plaintiffs' primary legal

argument is with a case which this Court has declined to review. *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994)(en banc), *cert. denied*, 115 S.Ct. 205 (1994).[4] That case is discussed in Question C herein. Plaintiffs spend much more time discussing *S-1* than they do in disputing the correctness of the judgment below. Regardless of whether the rule in *S-1* is followed in this case, however, the Court of Appeals reached the correct result. The benefits plaintiffs obtained from this litigation were meager or nonexistent, and the appropriate fee award, under prior decisions of this Court, was no fee at all.

Plaintiffs' "success" began and ended with the filing of the summons and complaint in the *Burton* case and the uncontested preliminary ruling shortly thereafter that the 1980 Census could not serve as the basis for legislative districts in the 1990's. The remainder of plaintiffs' effort, and nearly all their time and costs, were devoted to advocating the creation of districts which served the plaintiffs' respective (and complementary) partisan goals. However, the district court adopted a redistricting plan which, as that court later noted, "did not remotely resemble the plans proposed by either plaintiff." Pet. App. 25. The district court noted that plaintiffs' plans were not only rejected, but that the testimony offered by plaintiffs and heard by the court "was of little help in creating [the court's] plan." *Id.* Plaintiffs thus seek public reimbursement not for the successful vindication of constitutional rights, but for their rejected self-serving and partisan efforts.

Courts have declined to award fees for unsuccessful

[4] Remarkably, plaintiffs' citation of *S-1* does not mention the denial of certiorari in the case. *See, e.g.*, Pet. at vi, 7.

lobbying of a redistricting plan in the courts. The familiar standard for determining whether one is a "prevailing party" under 42 U.S.C. § 1973*l*e or 42 U.S.C. § 1988 is whether the plaintiff has "succeed[ed] on a significant issue in litigation which achieves some of the benefits the party sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 443 (1983). In reapportionment cases the application of this standard is not as straightforward as in many other types of civil rights cases. Unlike the typical action for damages, or even the typical action for an injunction, the result obtained is often far different from the result sought by a particular plaintiff. In *Hastert v. Illinois State board of Election Commissioners*, 28 F.3d 1430 (7th Cir. 1993), *cert. denied*, 115 S.Ct. 426 (1994), the Seventh Circuit noted:

> This is not ordinary litigation. . . . Each [plaintiff] had a plan to offer and the winner, at least from a lay person's perspective, is the litigant whose plan and objectives (usually incorporated in its map) the district court adopted. Conveniently, this common-sense understanding of winners and losers coincides in large part with the Supreme Court's definition of "prevailing party."

28 F.3d at 1439.[5] *See also*, *Daggett v. Kimmelman*, 811 F.2d 793, 801 (3d Cir. 1987)(state was "not obligated to compensate counsel's efforts merely to maximize anyone's political advantage").

The district court, noting that the reasoning of *S-1* was

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[5] *Hastert* concluded that the court's ultimate approval of one party's plan made that party the "clear winner." 28 F.3d at 1440.

disapproved by other circuits, reviewed the attorneys' fee petition independently of the reasoning of *S-1*. Pet. App. 19-27. It concluded as follows:

1. The uncontested decision that plans based on the 1980 Census could no longer be used was not a "significant issue." Pet. App. 20. *See Farrar, supra,* 506 U.S. at 110.

2. The declaration that the South Carolina General Assembly was at an impasse was a procedural and interlocutory victory which "eventually led to a rejection of the plans proposed by the plaintiffs." Pet. App. 23 (citing *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)).

3. The creation of a minority opportunity Congressional district was not a victory for the plaintiffs, whose plans for such a district "did not remotely resemble the plans proposed by either plaintiff." Pet. App. 25. The court further noted that every plan presented at the trial, including the defendants' plan, contained such a district. Pet. App. 24.[6]

4. While the plaintiffs prevailed on their argument that the State Senate plan should be

[6] Apparently only SRAC argued in the district court that prevailing party status could be based on the creation of the minority opportunity Congressional district. The district court noted that SRAC's presence as to this issue was "superfluous," since the Republican Party had already filed suit. Pet. App. 24.

precleared by the Justice Department before a special Senate election could be held, this victory was "pyrrhic," because it led to the Justice Department's approval of the court's 1992 plan, a plan which plaintiffs had strenuously opposed. The practical result from this "victory" rendered it merely technical or *de minimis*, and therefore not compensable. Pet. App. 26, 30 (quoting *Farrar, supra*, 506 U.S. at 117 (O'Connor, J., concurring).

5. Finally, a judgment which plaintiffs obtained from this Court, vacating and remanding the district court's decision, did not lead to any actual relief for the plaintiffs and thus was likewise merely technical and *de minimis*. Pet. App. 27, 29. The vacatur order required the district court to consider the case "in light of the position of the Solicitor General" in a brief filed in the case, but this Court did not order that results of the elections already held be vacated. Pet. App. 27. Essentially the issue was whether the plan should be reviewed under Section 2 of the Voting Rights Act. However, since the South Carolina General Assembly eventually agreed on a reapportionment plan, it was unnecessary for the district court to conduct this reconsideration.[7]

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[7] A further anomaly of plaintiffs' position is that they now claim that the district court decision they appealed to this Court was a decision on which they prevailed, and indeed was an "exceptional" success. Pet. at 15. This is a rather noteworthy revision of their original estimate of the value of the district court's plan. If, as Petitioners state, the adoption of the court's plan achieved "essentially all of the basic goals of [Petitioners'] litigation," Pet. App. 17, one has to question why nearly all the fees sought were for work in advocating completely different plans.

Each of the above conclusions of the district court was reached specifically without reference to *S-1*. In addition, the results reached by both the district court and the Court of Appeals embodied a correct application of this Court's precedents. For instance, *Farrar v. Hobby, supra,* requires that in order to qualify as a prevailing party,

> [t]he plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt, supra,* 482 U.S. at 760, or comparable relief through a consent decree or settlement. *Maher v. Gagne,* 448 U.S. 122, 129 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.

In *Hewitt, supra,* 482 U.S. at 763, this Court left the "catalyst" issue open:

> We need not decide the circumstances, if any, under which this "catalyst" theory could justify a fee award under §1988, because even if Helms can demonstrate a clear causal link between his lawsuit and the State's amendment of its regulations, and can "prevail" by having the State take action that his complaint did not in terms request, he did not and could not get redress from promulgation of the informant-testimony regulations.

No subsequent decision of this Court has explicitly considered the issue of whether one who has received no enforceable remedy from the litigation may still be

compensated for playing the alleged role of a "catalyst" for a defendant's later change in conduct. It is not necessary to consider the "catalyst" issue, because plaintiffs clearly did not succeed under the principles set forth in *Farrar* and *Hewitt*.

The position of the plaintiffs in obtaining an uncontested judgment that the districts based on the 1980 Census could no longer be used is comparable to the nominal damages judgment received by the plaintiff in *Farrar*. Since the court did not adopt the plaintiffs' plans, or anything close to them, the result was similar to that described in *Hewitt*, where the plaintiff received only "the moral satisfaction [that] results from any favorable statement of law." *Hewitt*, *supra*, 482 U.S. at 762. The district court's formal declaration of the obvious, moreover, did not "modify[ ] the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111-112. The lack of direct benefit to the plaintiffs from the original judgment in this case is shown by the decision of SRAC and Governor Campbell to appeal it to this Court.

It is not reasonably arguable that any other results in this case constituted "relief . . . [which] directly benefit[ted] [plaintiffs] at the time of judgment or settlement." *Farrar*, 506 U.S. at 11. Plaintiffs cannot point to any benefit to them from this Court's vacatur judgment which never led to a further judgment on the merits, nor can they claim to have derived benefit from the decision requiring preclearence of the Senate plan when the result of the preclearence process was adverse to their position.

Plaintiffs claim that the result in this case is undesirable from a policy standpoint because it will make it more difficult

"for economically disadvantaged minorities[8] to redress their grievances in the courts." Pet. at 23. In fact, however, requiring that a party actually succeed in litigation before recouping attorneys' fees is the soundest possible way to insure that the time of the courts and the parties will not be wasted with the use of high-priced lawyers to make lengthy presentations of extravagantly partisan positions. Since clients in civil rights cases seldom pay their counsel in the event of a loss, and therefore do not necessarily seek to limit the costs, only the courts can control the cost of this litigation to the public treasury. Plaintiffs' effort to recover $570,000 in attorneys' fees for their futile efforts to lobby their political positions in litigation was properly rejected by both the three-judge district court and by the Court of Appeals.

B. *Any conflict among circuits should await resolution until a case arises in which the issue is dispositive.*

Any conflict between the rule of the Fourth Circuit's *S-1* case and the rule followed in other circuits should await its presentation in a case in which the resolution of the conflict would affect the outcome of the case. If this Court were to review this case, it is extremely doubtful that a different result would be reached even if this Court were to disapprove the Fourth Circuit's rule in the *S-1* case. For this reason alone, certiorari should be denied.

In addition, there is no likelihood that the plaintiffs' 1991 lawsuits were the "catalysts" for the General Assembly's 1994 and 1995 enactments establishing reapportionment plans different from the plans adopted by the

[8] This term presumably excludes the Republican Party.

three-judge court for the 1992 elections. Even in those circuits in which the catalyst theory has been applied, the courts have insisted that plaintiffs prove the causal connection between their lawsuit and the defendants' change in conduct. *See, e.g., Pearson v. Fair*, 980 F.2d 37, 44 (1st Cir. 1992); *Stivers v. Pierce*, 71 F.3d 732, 752 (9th Cir. 1995). Beyond a bald assertion of the claim, Pet. App. 16, plaintiffs devote no effort to trying to prove that this case later caused the South Carolina General Assembly to enact its own reapportionment plans several years after the vacated 1992 district court decision. This is another reason in and of itself why this case is poor vehicle for examination of the merits of applying catalyst theory. Plaintiffs spend nearly 15 pages discussing why catalyst theory should apply to this case, but only one sentence asserting that their suit actually was a catalyst for the General Assembly's subsequent actions. The absence of a catalyst effect in this case was noted in Judge Niemeyer's concurring opinion. Judge Niemeyer stated that even aside from the *S-1* rule, the "question of who prevailed, even when measuring the results obtained through the political process, is so unclear that [the district court could not be held to have abused its discretion in denying fees]." Pet. App. 9. Since plaintiffs cannot reasonably claim that their suit was the catalyst for the subsequent adoption of legislatively-enacted plans, and indeed hardly make the effort to do so, review of catalyst doctrine would be a useless exercise for this Court in this case.

C. *The Fourth Circuit's rule in S-1 is the preferable rule because it avoids the examination of confusing threads of causation.*

In the *S-1* case, the Fourth Circuit adopted a clear rule which is the logical extension of cases such as *Farrar* and *Hewitt*. *S-1* holds that fees should not be awarded unless a

plaintiff has obtained relief "by virtue of having obtained an enforceable judgment, consent decree or settlement giving some of the legal relief sought in a §1983 action." 21 F.3d at 51. This statement is nearly an exact quote from *Farrar*, 506 U.S. at 111.[9] In *S-1*, the settlement of the case with local officials caused the underlying judgment to become moot. As a result, the Fourth Circuit dismissed the case and vacated the district court's judgment. *S-1 v. Spangler*, 832 F.2d 294 (4th Cir. 1987). Three years after the dismissal and vacatur, the North Carolina legislature amended the statute involved in the case. The plaintiffs, who had derived full satisfaction from the local entity's action some years earlier, sought attorneys' fees based on the claim that their suit was the catalyst for the state's action.[10] The en banc decision of the Fourth Circuit concluded that absent the prerequisite judgment or other enforceable form of remedy, the above-quoted requirements of *Farrar* and *Hewitt* had not been met.

In the unlikely event that this case is viewed as a proper vehicle for review of the Fourth Circuit's *S-1* rule, the respondent Wilkins submits that that case represents the

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[9] "The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt, supra*, 482 U.S., at 760, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122 (1980)." *Farrar*, 506 U.S. at 111.

[10] This rendered the case different from the more typical voluntary-abandonment cases in which the change in conduct comes first and is followed by the dismissal for mootness. As the opinion adopted by the full Fourth Circuit explained, it is hard to understand "how moot lawsuits, in which the possibility of relief against a party is by definition foreclosed, continue nonetheless to function as catalysts for change and for the recovery of attorneys' fees." 6 F.3d at 170.

better rule.[11] As Judge Niemeyer's concurring opinion in the present case points out, the purpose of the fee shifting statutes is to "reward successful *litigants*, not success in the political process even if the political success was a response to the litigation." Pet. App. 9 (emphasis in original). Judge Niemeyer further noted that the point of *S-1* was to avoid awarding attorneys fees to litigants "simply because their position in litigation was vindicated by an external process or sequence of events outside the litigation." *Id.*

The rule adopted by the Fourth Circuit in *S-1* holds that

> *Farrar* merely clarified *Hewitt* by stressing that a voluntary change in conduct must be formalized in a legally enforceable settlement agreement to transform a plaintiff into a prevailing party for purposes of §1988. * * * In other words, the change in conduct must be enforceable in court, not merely gratuitous.

6 F.3d at 171. The requirement of an enforceable judgment or settlement agreement provides "a clear rule for achieving prevailing party status." *Id.* Absent this bright line standard, district courts would be forced to "untangle a web of supposed causal connections to determine whether a party prevailed." *Id.* at 171-172. The contrary standard is awash in ambiguity, as shown by the original panel majority opinion in *S-1*. The panel majority would have had district courts inquiring into whether "the outcome, in whatever form it is realized" was one to which the claimant's efforts "contributed in a substantial way;" this inquiry "will range outside the merits of the basic controversy"

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[11] If certiorari were to be granted, this point would be argued more fully in this respondent's brief on the merits.

and would require courts to "look outside the final judgment to voluntary actions taken by a defendant [which] are causally connected to the litigation." *Id.* at 171 (quoting panel majority opinion, 6 F.3d at 164). Such a broad and vague inquiry would often contravene the direction of *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) that a fee request "should not result in a second major litigation."

Finally, as the opinion adopted by the en banc majority holds, awarding fees for actions taken outside the context of the litigation "serves to disable public officials, who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorneys' fees." *S-1*, 6 F.3d at 172. Such a result would penalize state and local officials for making salutary changes.

The post-*Farrar* cases cited by Petitioners, Pet. 13-15, do not represent as monolithic a bloc of authority as Petitioners suggest; indeed, some of those cases illustrate the preferability of the *S-1* approach. For instance, two of the cases cited by Petitioners would have come to the same result applying *S-1*.[12] Two others are significantly distinguishable because the change in conduct occurred *before* the dismissal of the case, unlike the situation in *S-1*.[13] Three cases

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[12] *Kilgour v. City of Pasadena*, 53 F.3d 1007 (9th Cir. 1995)(enforceable judgment existed); *Beard v. Teska*, 31 F.3d 942 (10th Cir. 1994)(settlement existed).

[13] *Paris v. HUD*, 988 F.2d 236 (1st Cir. 1993); *Zinn by Blankenship v. Shalala*, 35 F.3d 273 (7th Cir. 1994).

resulted in findings that no catalyst effect was present.[14] In only two of the ten cases cited at pp. 13-15 of the Petition were the Courts of Appeals able to determine both that the catalyst principle applied *and* that in their view the lawsuit had served as the cause of the defendants' changed conduct; even those two were remanded for determination of the appropriate fee amount.[15] Finally, three of the ten cases were remanded for further findings of fact as to whether the suit was a catalyst for change.[16] In other words, in six of the seven cases cited by Petitioners in which the Courts of Appeals did not rule out an award of fees, a remand was necessary either in order to determine whether a causal connection actually existed, or in order to determine the fee amount. Such protracted fee litigation when catalyst arguments are present go far toward making fee litigation "a second major litigation." *Hensley, supra,* 461 U.S. at 437.[17]

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[14] *Craig v. Gregg Co., Texas*, 988 F.2d 18 (5th Cir. 1993); *Brown v. Local 58, IBEW*, 76 F.3d 762 (6th Cir. 1996); *American Council of the Blind v. Romer*, 992 F.2d 249 (10th Cir. 1993).

[15] *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255 (6th Cir. 1993); *Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1*, 17 F.3d 260 (8th Cir. 1994).

[16] *Paris v. HUD*, 988 F.2d 236 (1st Cir. 1993); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541 (3d Cir. 1994); *Zinn by Blankenship v. Shalala*, 35 F.3d 273 (7th Cir. 1994).

[17] It should also be noted that *S-1* was a 7-6 en banc decision of the Fourth Circuit. In view of the closeness of the vote, the atypicality of the fact situation, and the number of cases from other circuits which subsequently have questioned *S-1*, it is possible that the Fourth Circuit might choose to modify *S-1* in an appropriate case. Petitioners in the present case did not seek rehearing en banc.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari in this case is without merit and should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

Petitioners,

v.

DAVID M. BEASLEY, GOVERNOR OF SOUTH CAROLINA, *et al.*,

Respondents.

On Petition of a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION FOR THE SOUTH CAROLINA SENATE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should consider the validity of the so-called "catalyst" theory for awarding attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988(b), where, even if that theory were applied, Petitioners still would not be entitled to attorneys' fees because the trial court did not abuse its discretion in determining that whatever successes Petitioners achieved in the litigation were *de minimis*?

2. Whether the courts below abused their discretion in concluding that relief obtained by Petitioners in the form of a court order requiring the Senate to obtain preclearance of a district for use in a special election pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, was *de minimis,* in light of the fact that the district was precleared without any objection from the Department of Justice and was used without any changes in the special election?

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STATEMENT OF THE CASE

I. THE UNDERLYING LITIGATION

This case arises out of South Carolina's efforts in the early 1990s to redraw its state legislative and congressional districts. Not surprisingly, the 1990 census figures revealed that the boundaries of the districts drawn in the 1980s had become unconstitutionally apportioned and, therefore, had to be redrawn. *See* Appendix to Petition for Writ of Certiorari ("App.") 4, 12. Both the State House and Senate formed subcommittees to develop new redistricting plans, but were unable to pass plans prior to adjournment of the General Assembly's 1991 legislative session. App. 4.

A. Proceedings In The Three-Judge Court

In October 1991, Michael Burton, in his capacity as Executive Director of the South Carolina Republican Party ("Republican Party"), and the Statewide Reapportionment Advisory Committee ("SRAC"), an unincorporated association of private individuals and organizations in South Carolina that advances the interests of African-Americans (collectively, "Petitioners"), brought separate suits challenging the state legislative and congressional districts drawn in the 1980s. *See* App. 4, 13; *Burton v. Sheheen*, 793 F. Supp. 1329, 1337-38 (D.S.C. 1992), *vacated and remanded sub nom. Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993). Both complaints alleged that these districts were unconstitutionally apportioned and violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and sought an injunction precluding any future use of these districts, a declaration that the legislative process was at an impasse, and an order adopting redistricting plans proposed by each Petitioner. *See* App. 13. The two cases

were consolidated before a three-judge court pursuant to 28 U.S.C. § 2284, which requires that challenges to the constitutionality of a statewide redistricting plan be heard by such a court. *See* App. 4, 13. The State Senate obtained permission to intervene, along with the South Carolina Democratic Party and others. *Burton*, 793 F. Supp. at 1338.

In January 1992, the General Assembly reconvened and passed reapportionment plans for the State House and Senate, but the Governor vetoed them and the General Assembly was unable to override the veto. App. 13. The General Assembly was unable to agree on a congressional redistricting plan. App. 13. In February 1992, all parties agreed that the legislature was at an impasse, and the three-judge court assumed the role of overseeing design and implementation of new redistricting plans for the 1992 elections. *See* App. 13.

In February 1992, a three-week trial began. All parties stipulated that the existing districts were unconstitutionally apportioned, *Burton*, 793 F. Supp. at 1336 n.2, and no party contended that they be used in the 1992 elections. Thus, no trial time was devoted to these issues. App. 20. Moreover, because all parties agreed that the existing districts were unconstitutional, the three-judge court found it unnecessary to consider whether these districts also violated Section 2 of the Voting Rights Act. *Burton*, 793 F. Supp. at 1336 n.2. Rather, the trial focused on the various redistricting plans advocated by each of the parties.

In May 1992, the three-judge court rejected all of the parties' proposed plans, finding that they "suffered an array of infirmities." *Burton*, 793 F. Supp. at 1369. In particular, the three-judge court found that the Republican

Party's proposed plan "disregard[ed] . . . county lines and communities of interest" in an effort to "garner [more] black voters" and failed to observe South Carolina's traditional redistricting policies. *Id.* at 1360. The three-judge court further stated that "the same maladies that afflict the . . . Republican Party's plan, i.e. splitting county . . . [and] precinct lines, afflict the SRAC plan." *Id.* at 1359 n.58. The court proceeded to draw its own plans, which contained fewer black-majority districts than those proposed by Petitioners for the State House and Senate and "did not remotely resemble the plans proposed by either [Petitioner]." *Id.* at 1365-66; App. 24-25.

In explaining the plans it fashioned, the three-judge court stated that it had attempted to follow what it viewed as the State's policy of adhering to county lines in drawing districts. *Burton*, 793 F. Supp. at 1341. The court also discussed its adherence to the "one person, one vote" rule and Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, in drawing its plans. *Id.* at 1342-48. The court declined, however, to conduct a full analysis of whether its plans complied with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *Id.* at 1350-51.

B. Proceedings In The Supreme Court

Having failed to obtain implementation of the plans it preferred, the SRAC (but not the Republican Party) appealed the three-judge court's decision to this Court. While the United States was not a party in the trial court, this Court requested the views of the Solicitor General. *Statewide Reapportionment Advisory Committee v. Theodore*, 506 U.S. 951 (1992).

On June 14, 1993, this Court vacated the lower court's judgment and remanded for "further consideration in light of the position presented by the Acting Solicitor

General in his brief for the United States." *Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993). In his brief, the Solicitor General argued that the three-judge court (1) failed to perform a plenary analysis of whether its plan complied with Section 2 of the Voting Rights Act; (2) improperly considered preservation of county lines as the predominant state policy in redistricting; and (3) improperly subordinated the requirements of Section 2 to the policy of preserving county lines. Brief for the United States as Amicus Curiae, *Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993) (Nos. 92-155 and 92-219), at 9-17. While the Court remanded the case, it did not vacate the 1992 elections, which had been held using the three-judge court's plans. App. 14.

C. Proceedings On Remand

On remand, the three-judge court provided the General Assembly with an opportunity to develop and obtain preclearance of new plans for future use.[1] In 1994, the General Assembly passed and obtained preclearance of a congressional redistricting plan and a plan for the State House, which were used in the 1994 elections. *See* App. 14. Neither the SRAC nor the Republican Party

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[1] Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires certain jurisdictions, including South Carolina, to obtain prior approval, known as "preclearance," of changes in laws, practices, or procedures affecting voting. *See Georgia v. United States*, 411 U.S. 526, 534-35 (1973) (holding that Section 5 applies to redistricting plans). To obtain preclearance, such jurisdictions must prove either to the United States Attorney General or to a three-judge district court in the District of Columbia that the proposed change has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. § 1973c.

challenged these precleared plans. Petition for Writ of Certiorari ("Pet.") 5-6.

In June 1994, while the General Assembly was still developing a new redistricting plan for the Senate, which did not have a scheduled election until 1996, a vacancy occurred in Senate District One when the incumbent was elected to a judgeship. *See* App. 14-15. (Senate District One is in the northwestern corner of the State. It is a predominantly white rural district. All parties to the *Burton* litigation drew this district in similar ways; it was not one of the districts as to which the parties were in dispute regarding its racial composition.) The Senate sought permission to hold the special election using the district lines drawn by the three-judge court. App. 15. The Senate took the position that, because the district had been drawn by the court, its use in the special election did not have to be precleared by the Department of Justice ("DOJ"). *See Connor v. Johnson*, 402 U.S. 690 (1971) (holding that court-drawn redistricting plans are not subject to the preclearance requirement). DOJ disagreed, as did the SRAC and the Republican Party. The three-judge court denied the Senate's request and held that the use of the district had to be precleared. App. 15. Thus, the Senate submitted the district to DOJ, obtained preclearance, and conducted a special election using the same district the three-judge court had drawn in 1992. *See* App. 15. The outcome of this election had no effect on the racial makeup of the Senate.

In May 1995, the General Assembly enacted a new redistricting plan for the Senate and obtained preclearance. App. 15. Neither the SRAC nor the Republican Party objected to this plan. Pet. 6-7. In short, by June 1995, the General Assembly had passed, and obtained preclearance of, a new congressional redistricting plan and

new plans for the State House and Senate. App. 6. Two months later, the three-judge court dismissed the entire case. App. 6.[2]

II. THE ATTORNEYS' FEES LITIGATION

A. Proceedings In The Three-Judge Court

The SRAC and the Republican Party each subsequently requested attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988(b), contending that they were "prevailing parties" in the redistricting litigation within the meaning of those statutes and thus entitled to fees. App. 6. The three-judge court denied the motions in their entirety. App. 31. To be a "prevailing party," the three-judge court stated, a plaintiff must obtain "'some relief on the merits of his claim,'" in the form of either "'an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement.'" App. 17 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)).

Applying these standards, the three-judge court found that "as a matter of law [Petitioners] cannot be considered prevailing parties because an enforceable judgment against the defendants no longer exists." App. 18. The court noted that while its opinion in *Burton* constituted a judgment on the merits, Petitioners "could

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[2] Although Petitioners do not refer to the events following the enactment of state legislative and congressional redistricting plans, many of the black-majority districts in the State House and Senate that were drawn after the remand from the Supreme Court were subsequently held unconstitutional on the grounds that race was a predominant factor in the drawing of these districts, and that the districts were not narrowly tailored to achieve a compelling government interest. *See Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996).

no longer enforce" that order "because the Supreme Court vacated it." App. 18.

Turning to the Republican Party's claim that its lawsuit had acted as a catalyst in causing the State to redistrict, the three-judge court held that claim must fail because the Fourth Circuit had "rejected the catalyst theory as a means of determining who is a prevailing party." App. 18 (citing ***S-1 and S-2 v. State Bd. of Educ.***, 21 F.3d 49 (4th Cir.) (en banc), ***cert. denied***, 115 S. Ct. 205 (1994)). (Under this theory, a plaintiff may be deemed a "prevailing party" eligible for attorneys' fees even if he did not succeed on some aspect of the merits of his case so long as his lawsuit was the catalyst that caused non-judicial branches of government to provide the desired relief to the plaintiff. *See* App. 9, 10.)

The three-judge court went on to find, however, that regardless of the validity of the "catalyst" theory, the SRAC and the Republican Party "would not be entitled to attorneys' fees under ***any*** theory because their successes were only technical or ***de minimis.***" App. 19 (emphasis added).

The three-judge court first found that Petitioners had not achieved significant relief in obtaining a declaration that the existing districts were malapportioned and an injunction against their future use. The court explained that "the issue of whether the existing plans were constitutional was . . . never in dispute before this court. Further, this issue consumed virtually none of the court's time . . . . Similarly, since all parties agreed the existing plans were unconstitutionally apportioned, it strains reason to suggest the issue of whether these plans could continue to be employed was a significant one." App. 20. Because a party must "succeed on a significant issue" to qualify as a

"prevailing party," the court reasoned, Petitioners could not be considered "prevailing parties" on the issues of malapportionment and continued use of the existing districts. App. 20.

The three-judge court next found that Petitioners were not "prevailing parties" on the question of whether a legislative impasse existed. The court observed that, although it had found in February 1992 that an impasse existed, this ruling was merely a "procedural" one that "allowed the case to proceed to trial" and "in no way affected the merits." App. 22. Moreover, like the issue of whether the existing districts were malapportioned, the impasse question was essentially undisputed. *See* App. 13 ("On February 10, 1992, the court convened a status conference at which all parties agreed that the legislative process was at an impasse with respect to redistricting."). Accordingly, the court found that "because the impasse issue was not significant and the agreement failed to change the legal relationship between [Petitioners] and the defendants, . . . [Petitioners] are not prevailing parties on the impasse issue." App. 23.

The three-judge court next considered whether Petitioners qualified as "prevailing parties" based on the state legislative and congressional redistricting plans implemented by that court. The court first rejected the Republican Party's claim that it had been a catalyst in the court's decision to draw a black-majority congressional district, observing that none of the parties at trial had opposed the creation of such a district. App. 23-24.

The three-judge court likewise rejected the claim of the SRAC that it had prevailed by causing the court to implement new state legislative and congressional redistricting plans.

> The obvious motive and goal of [Petitioners] was to get their plan adopted by the court. As this court made abundantly clear in the underlying order, the plans presented by the parties suffered a myriad of infirmities. In addition, we emphasized the plans we fashioned were our own and did not remotely resemble the plans proposed by either [Petitioner]. . . . Thus, it cannot be credibly asserted that [Petitioners] "prevailed" in the creation of the interim plans this court ordered . . . .

App. 24-25 (note omitted).

By contrast, the three-judge court found that the SRAC had prevailed in having the three-judge court's judgment vacated by this Court. App. 27. Nonetheless, the three-judge court declined to award the SRAC any attorneys' fees, stating:

> In essence, what the SRAC achieved was a situation where the Supreme Court's order vacated the judgment, but left undisturbed the actions performed under the judgment. Indeed, the Supreme Court did not invalidate the 1992 Senate elections held pursuant to the vacated court order. And, in addition, the period whereby the court-drawn plans ceased to exist was short-lived. In 1994, the General Assembly passed a House of Representatives' act which became law and later was precleared for use by the DOJ. Also in 1994, a plan for the congressional districts was passed and

precleared. Then, in 1995, a Senate Act became law and was also precleared.

App. 29. In light of these facts, the three-judge court concluded that the SRAC's success on appeal was "merely technical and *de minimis.*" App. 29.

The three-judge court also found that Petitioners were "prevailing parties" on the question of whether the Senate had to obtain preclearance in order to use the court-drawn District One for a special election to fill a vacancy. App. 25-26. The three-judge court reasoned that the order requiring the Senate to obtain preclearance was enforceable by Petitioners and, therefore, satisfied *Farrar*'s requirement that a plaintiff have an enforceable judgment. App. 26. The three-judge court denied attorneys' fees on this issue, however, finding that "[i]n light of the DOJ's subsequent preclearance of the plan, [Petitioners'] victory was pyrrhic at best. While [Petitioners] were successful in having the plan submitted for preclearance, the election ultimately was conducted pursuant to the 1992 plan," the very plan that the Senate had advocated using. App. 26. Accordingly, the court found that Petitioners' victory on this issue was *de minimis* and, therefore, did not justify an award of attorneys' fees. App. 29.

B. Proceedings In The Court Of Appeals

The Court of Appeals for the Fourth Circuit affirmed the denial of attorneys' fees for all aspects of the litigation. App. 8.[3] Stating that the issue presented for appeal was whether the SRAC and the Republican Party

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[3] Unlike cases related to the merits of a redistricting plan, which are appealed directly to this Court pursuant to 28 U.S.C. § 1253, disputes concerning awards of attorneys' fees are appealed to the intermediate circuit courts of appeals.

were "prevailing parties," the court concluded that its previous decision in *S-1 and S-2*, 21 F.3d at 51, had "rejected 'catalyst' analysis of causation in determining prevailing party status" on the grounds that this theory could not be reconciled with this Court's holding in *Farrar*. App. 6-7. Applying *S-1 and S-2* to the instant case, the court of appeals held that Petitioners did not qualify as "prevailing parties." App. 8. The court of appeals reasoned that because the three-judge court's judgment on the merits was vacated on appeal, Petitioners could not enforce that judgment against the defendants. App. 8. The court of appeals further held that this Court's order vacating and remanding to the three-judge court for further consideration did not constitute an enforceable judgment against the defendants. App. 8. Finally, the court of appeals held that Petitioners' success concerning the Section 5 preclearance claim was too insignificant to qualify them as "prevailing parties." App. 8.

In a concurring opinion, Judge Niemeyer agreed with the majority that *S-1 and S-2* had rejected the "catalyst" theory. He also agreed that, to be a "prevailing party," a plaintiff "must obtain relief in the action on the merits of his claim," and he stated that success in the political process does not satisfy that requirement, even if the political success was a response to the litigation. App. 9. Finally, Judge Niemeyer concluded that even if "prevailing party" status was determined by examining the results obtained through the political process, he "could not conclude that the district court abused its discretion in denying the [Petitioners'] attorneys fees." App. 9.[4]

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[4] Judge Motz also concurred, indicating that, in her view, Petitioners would have prevailed under the "catalyst" theory but that the court of appeals was bound by its prior rejection of that theory. App. 9-10.

SUMMARY OF ARGUMENT

1. The alleged conflict among the circuit courts concerning the viability of the "catalyst" theory to justify an award of attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988(b) is not properly presented to the Court on the facts of this case. Petitioners never asked the court of appeals to reconsider its rejection of the "catalyst" theory. In fact, Petitioners expressly disavowed reliance on that theory for determining whether they were "prevailing parties." The court of appeals thus did not have the opportunity to consider anew the merits of the theory. In the absence of such consideration, this Court ought not to grant certiorari. *See infra* pp. 15-16.

2. Regardless of whether the "catalyst" theory applies, Petitioners are not entitled to recovery of attorneys' fees because any arguable successes they achieved in the litigation were *de minimis* and, therefore, too insignificant to qualify them for attorneys' fees. The three-judge court analyzed each of Petitioners' claims for attorneys' fees separately and determined, in the exercise of its sound discretion, that given the *de minimis* nature of each success, Petitioners were not entitled to fees under any theory. Because the three-judge court did not abuse its discretion in determining that Petitioners are not entitled to recover fees under any theory, and because its decision was entirely consistent with the principles set forth by this Court governing recovery of attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988(b), resolution of the viability of the "catalyst" theory will not affect the outcome of this case. *See infra* pp. 16-27.

REASONS FOR DENYING THE WRIT

ANY CONFLICT AMONG THE CIRCUITS REGARDING THE "CATALYST" THEORY NEED NOT BE RESOLVED HERE BECAUSE DENIAL OF ATTORNEYS' FEES IS PROPER BASED ON GROUNDS WHOLLY UNRELATED TO THAT THEORY

This is a case where Petitioners seek well over $500,000 in attorneys' fees despite obtaining essentially none of the relief they sought. As the three-judge court recognized, what the SRAC and the Republican Party really wanted was an order imposing their proposed redistricting plans. Petitioners failed completely in this regard: the three-judge court rejected their plans out of hand because they suffered "an array of infirmities." *Burton*, 793 F. Supp. at 1369. As the Senate now demonstrates, the only issues on which Petitioners even arguably succeeded were either uncontested, procedural, or insignificant. Thus, the denial of attorneys' fees by the lower courts was entirely appropriate, and this Court should not grant certiorari.

I. Introduction

Section 1988 of Title 42 of the United States Code provides, in relevant part:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b). Section 1973l(e) of Title 42 of the United States Code contains virtually identical "prevailing

party" language.[5] Therefore, this Court has indicated that these provisions should be similarly construed. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980).

This Court has held that to be deemed a "prevailing party" within the meaning of these provisions, a plaintiff must succeed on a "'significant issue in litigation.'" *Hensley*, 461 U.S. at 433 (citation omitted); *Farrar*, 506 U.S. at 109. Moreover, that victory must consist of some relief on the merits in the form of "an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement." *Farrar*, 506 U.S. at 111 (citation omitted). Whatever the form of relief, it must materially alter the legal relationship of the parties. *Id.* Moreover, a *de minimis* or purely technical victory, even if it suffices to make a plaintiff a "prevailing party," does not justify an award of attorneys' fees. *Id.* at 112-13; *see also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989). In the present case, when the litigation concluded, Petitioners did not have an enforceable judgment against the defendants, nor a consent decree or settlement agreement with the defendants. For this reason alone, the petition for certiorari should be denied.

Petitioners nonetheless contend that the court of appeals erred by rejecting the so-called "catalyst" theory for determining "prevailing party" status. Pet. 9, 12-13. Under this theory, in certain circumstances, a plaintiff can obtain attorneys' fees, even if he does not prevail on a

[5] Specifically, Section 1973l(e) provides, "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1973l(e).

significant issue in court, if his lawsuit prompts remedial action by a defendant. *See, e.g., Brown v. Local 58, Int'l Bhd. of Elec. Workers*, 76 F.3d 762, 771-72 (6th Cir. 1996). Petitioners claim that the Fourth Circuit's rejection of the "catalyst" theory conflicts with the approach taken by all other circuits, and request that this Court grant certiorari to resolve the alleged conflict.

II. This Court Should Deny The Writ Because Petitioners Disclaimed Reliance On The "Catalyst" Theory In The Court Below As A Means Of Satisfying The "Prevailing Party" Requirement

At the outset, the Senate notes that the central issue Petitioners present here differs from any of the arguments they advanced in the court of appeals. There, Petitioners disclaimed any reliance on the "catalyst" theory as a means of satisfying the "prevailing party" requirement of both 42 U.S.C. §§ 1973l(e) and 1988(b). *See* Reply Brief for Plaintiffs-Appellants 10 (filed April 19, 1996) ("Reply Br.") ("Appellants do not claim . . . that they are prevailing parties based on catalyst theory.") (attached as Appendix). Petitioners never requested the Fourth Circuit to revisit its ruling in *S-1 and S-2* rejecting the "catalyst" theory as a basis for determining "prevailing party" status. Instead, Petitioners contended that courts should consider the "catalyst" theory in determining the *amount* of an award *after* "prevailing party" status had already been determined. Reply Br. 10 (Appendix). In their petition for certiorari, by contrast, Petitioners frame the issue as "[w]hether the court of appeals erred in rejecting . . . [the] 'catalyst' theory of causation in determining prevailing party status under 42 U.S.C. §§ 1973l(e) and 1988 . . . ." Pet. i.

While this Court is, of course, authorized to consider Petitioners' new argument, *see Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995), the Senate respectfully suggests that, in the absence of a plenary debate in the court of appeals on the issue that Petitioners present here, a grant of certiorari is not appropriate in this case. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."); *see also Bly v. McLeod*, 605 F.2d 134, 138 (4th Cir. 1979) (refusing to rule on basis of "catalyst" theory because the plaintiff did not raise the argument in the court below), *cert. denied*, 445 U.S. 928 (1980).

III. The Three-Judge Court Acted Well Within Its Discretion In Holding That Petitioners Were Not Entitled To Attorneys' Fees Under Any Theory Because Any Success They May Have Achieved Was *De Minimis*

Even if this Court should choose to consider Petitioners' new argument, the alleged conflict among the circuit courts need not and should not be resolved in this case because, regardless of whether the "catalyst" theory remains viable, the three-judge court acted well within its discretion in denying attorneys' fees on other grounds. Thus, certiorari should be denied because, whether or not the Fourth Circuit's reasoning conflicts with that of other circuits concerning the "catalyst" theory, the outcome of this case remains the same.

A. The Three-Judge Court Held That, Even Under The "Catalyst" Theory, Petitioners Were Not "Prevailing Parties" Because Whatever Successes They Achieved Were Insignificant

Petitioners essentially contend that they would have been entitled to recovery of attorneys' fees if the Fourth Circuit had applied the "catalyst" theory to this case. This argument, however, overlooks two crucial points. First, this Court has expressly held that while plaintiffs must be deemed "prevailing parties" to be eligible for recovery of attorneys' fees under 42 U.S.C. §§ 1973l(e) or 1988(b), *Hensley*, 461 U.S. at 433 & n.7, that determination alone does not warrant an award. If the claims on which plaintiffs prevail are purely technical or *de minimis*, an award of attorneys' fees is not justified. *Farrar*, 506 U.S. at 112-13; *see also Texas State Teachers Ass'n*, 489 U.S. at 792.

Second, Petitioners overlook the fact that while the court of appeals may have refused to apply the "catalyst" theory, the three-judge court held that "[Petitioners] would not be entitled to attorneys' fees under *any theory* because their successes were only technical or *de minimis*." App. 19 (emphasis added). Because the three-judge court made clear that the "catalyst" theory was included among the theories it considered in making this determination, App. 18-19, whether or not Petitioners' lawsuit operated as a catalyst for legislative action, Petitioners were not entitled to attorneys' fees. Thus, the applicability of the "catalyst" theory has no bearing on the outcome of this case.

B. The Three-Judge Court's Determinations Regarding Attorneys' Fees Must Be Upheld Absent An Abuse Of Discretion

Both 42 U.S.C. §§ 1973l(e) and 1988(b) explicitly grant a district court "discretion" to award attorneys' fees. In accordance with the statutory language, the circuit courts have consistently held that a district court's determinations as to "prevailing party" status and the amount, if any, of an attorneys' fees award should be reviewed only for abuse of discretion. *Goehring v. Brophy*, 94 F.3d 1294, 1304-05 (9th Cir. 1996) (district court's finding that plaintiff's lawsuit was not a catalyst was deemed not an abuse of discretion); *Brown*, 76 F.3d at 771; *Ruffin v. Great Dane Trailers*, 969 F.2d 989, 991-92 (11th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993); *Libby v. Illinois High Sch. Ass'n*, 921 F.2d 96, 98 (7th Cir. 1990); *see also Kansas Health Care Ass'n v. Kansas Dep't of Social & Rehabilitation Servs.*, 31 F.3d 1052, 1053 (10th Cir. 1994) ("prevailing party" determination is reviewed under clearly erroneous standard). Moreover, the district court's findings of fact underlying these determinations are reviewed only for clear error. *Corder v. Gates*, 104 F.3d 247, 249 (9th Cir. 1996); *Goehring*, 94 F.3d at 1304; *Brown*, 76 F.3d at 771; *Kansas Health Care*, 31 F.3d at 1053.

C. The Three-Judge Court Ruled Consistently With The Case Law And Did Not Abuse Its Discretion

As the three-judge court observed, App. 19, Petitioners initially sought four types of relief: (a) a declaration that the existing districts were unconstitutional, (b) an injunction prohibiting their future use, (c) a declaration that the legislative process was at an impasse,

and (d) adoption of the redistricting plans proposed by Petitioners. The three-judge court found that Petitioners had achieved only minimal success on these requests for relief. As demonstrated below, the three-judge court did not abuse its discretion.

(a), (b) The three-judge court accurately noted that the issues of whether the existing districts were unconstitutional and whether they could be used again were essentially undisputed. App. 20. These issues were conceded by the defendants in their answers to the complaint, and stipulated to before trial. App. 20; *Burton*, 793 F. Supp. at 1336 n.2. Consequently, these issues consumed almost none of the court's time and were disposed of by the court in a footnote in its opinion. App. 20; *Burton*, 793 F. Supp. at 1336 n.2. Because all parties were in agreement and no litigation on these issues was required, the three-judge court properly found that the issues were not significant in the litigation and that Petitioners were not entitled to attorneys' fees. This ruling was entirely consistent with this Court's precedents. *See Farrar*, 506 U.S. at 109 (plaintiffs must succeed on a significant issue in the litigation to be considered "prevailing parties"); *Hensley*, 461 U.S. at 433 (same).[6] Even if Petitioners' success on these issues could technically qualify them as "prevailing parties," because the

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[6] *See also Jackson v. Stevenson*, 666 F. Supp. 99, 100-02 (S.D. Miss. 1986) (plaintiffs sought a declaration that the existing districts were unconstitutional, an injunction against their continued use, and a court order implementing new redistricting plans; *held*, attorneys' fees denied under the "catalyst" theory because "at the time plaintiffs filed suit, defendants had already begun the process of redistricting and [they] . . . conscientiously strove toward that end regardless of plaintiffs' actions"), *aff'd mem.*, 810 F.2d 197 (5th Cir. 1987).

issues were undisputed from the outset, such a victory can only be viewed as too technical and *de minimis* to warrant any attorneys' fees. *Farrar*, 506 U.S. at 113; *Texas State Teachers Ass'n*, 489 U.S. at 792 (technical victory may be too insignificant to qualify for "prevailing party" status).

(c) The three-judge court also properly held that its finding in February 1992 that the General Assembly was at an impasse did not merit an award of attorneys' fees. This ruling did not represent any victory on the merits for Petitioners, but rather was merely an interlocutory ruling that allowed the case to go forward. App. 22-23. As such, this ruling did not warrant a fee award. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (denying attorneys' fees when "[t]he most that [the plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim"); *Hanrahan*, 446 U.S. at 759 ("procedural or evidentiary rulings . . . may affect the disposition on the merits, but [are] themselves not matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party"). Moreover, like the issues of malapportionment and preventing future use of the plans, the issue of whether there was an impasse was basically undisputed. Thus, even if the ruling on the impasse issue had made Petitioners "prevailing parties," that success was purely technical and *de minimis* and, therefore, did not merit recovery of attorneys' fees. *See Farrar*, 506 U.S. at 113.[7]

(d) The three-judge court also properly found that Petitioners were not "prevailing parties" by virtue of

[7] It would be particularly inappropriate to award Petitioners attorneys' fees based on a finding of legislative impasse given that the impasse was caused by a veto of the General Assembly's plan by a Republican governor.

obtaining court-ordered plans for the 1992 elections. App. 24-25. As the court noted, Petitioners' primary objectives with respect to new redistricting plans were not simply to secure new redistricting plans, but rather to have their respective proposed plans adopted. App. 24. Consequently, the parties spent the bulk of the trial and the bulk of their fees advocating their proposed plans. The SRAC and the Republican Party each advocated a plan for the Senate with fourteen black-majority districts -- the maximum number possible. The three-judge court, however, soundly rejected maximization. *See Johnson v. De Grandy*, 512 U.S. 997, 1022 (1994) (Voting Rights Act does not require drawing the maximum possible number of majority-minority districts). In particular, the Republican Party advocated the drawing of a district in the Savannah River valley along South Carolina's western border that disregarded established communities of interest in order to create an elongated, non-compact black-majority district.[8] The three-judge court soundly rejected this district. *Burton*, 793 F. Supp. at 1360. Finally, the SRAC and the Republican Party argued that, in measuring whether the proposed plans had a discriminatory effect under Section 5 of the Voting Rights Act, the court should have compared them with each other, rather than with the pre-existing plans. The three-judge court soundly rejected this argument as well. *Id.* at 1347-48; *see Beer v. United States*, 425 U.S. 130, 141-42 (1976) (comparing proposed plan with pre-existing plan to determine whether proposed plan had a discriminatory effect). In short, Petitioners' proposed plans "suffered an array of infirmities," 793 F. Supp. at 1369, and the court-ordered plans "did not remotely resemble the plans proposed by either [Petitioner]." App.

[8] The SRAC advocated a similar district in its proposed plan.

25. In fact, the court's plan more closely resembled the plans proposed by the Senate than those advanced by Petitioners.

Hastert v. Illinois State Board of Election Commissioners, 28 F.3d 1430 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 426 (1994), demonstrates that the three-judge court ruled correctly. There, relying on the principles set forth by this Court in *Hensley* and *Texas State Teachers Association*, the court held that a party whose proposed redistricting plan was rejected by the court could not be deemed a "prevailing party." 28 F.3d at 1439-43. In reaching this conclusion, the court explicitly rejected the losing party's argument that it prevailed because it "was a substantial factor in eradicating conduct that violates the Voting Rights Act." *Id.* at 1443. Here, as in *Hastert*, because their proposed plans were soundly rejected by the three-judge court, the SRAC and the Republican Party cannot be deemed "prevailing parties."[9]

The three-judge court also correctly ruled that the SRAC was not entitled to attorneys' fees as a result of this Court's decision to vacate the judgment of the three-judge

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[9] Noting that in redistricting litigation, the "winner, at least from a lay person's perspective, is the litigant whose plan and objectives (usually incorporated in its map) the district court adopted," the *Hastert* court stated, "Conveniently, this common-sense understanding of winners and losers coincides in large part with the Supreme Court's definition of 'prevailing party.'" *Hastert*, 28 F.3d at 1439. Under this standard, the party that came closest to prevailing was the Senate, since its proposed plan bore more resemblance than any other proposed plan to the plan ultimately drawn by the court for the Senate.

court and remand for further proceedings.[10] In *Hanrahan*, this Court ruled that plaintiffs are not "prevailing parties" when they convince an appellate court to reverse the trial court and to remand for additional proceedings. In that case, the trial court directed verdicts for the defendants in a civil rights action brought under 42 U.S.C. § 1983. The court of appeals reversed and remanded for a new trial. This Court held that the plaintiffs were not "prevailing parties" under 42 U.S.C. § 1988 because they had "not prevailed on the merits of any of their claims," but rather had demonstrated only that they "were entitled to a trial of their cause." 446 U.S. at 758; *see also Swietlowich v. County of Bucks*, 620 F.2d 33, 34 (3d Cir. 1980) (remand to trial court not sufficient, in and of itself, to make plaintiff a "prevailing party").

Thus, here (as in *Hanrahan*), Petitioners' entitlement to attorneys' fees cannot rest on their alleged success on appeal. Rather, they must demonstrate that they prevailed on some significant issue on the merits on remand. But Petitioners cannot make such a showing, because (even assuming the validity of the "catalyst" theory), the three-judge court did not find that the General Assembly's adoption of new plans following the remand rendered Petitioners "prevailing parties." And, as Judge Niemeyer stated in his concurrence in the court of appeals opinion, "the question of who prevailed, even when measuring the results obtained through the political process, is so unclear that whether we apply *S-1 and S-2* or evaluate who won in the political arena, I could not

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[10] As noted above, the Republican Party did not join the appeal to this Court, and thus cannot possibly recover attorneys' fees based on the appeal.

conclude that the district court abused its discretion in denying [Petitioners'] attorneys fees." App. 9.[11]

D. Petitioners' Alleged Success In Obtaining An Order Requiring The Senate To Preclear The Plan For The 1994 Special Election Was *De Minimis*

Both the court of appeals and the three-judge court found that Petitioners' success in obtaining a court order which required the Senate to submit the court-ordered plan for District One that had been used for the 1992 elections for preclearance before using it in a 1994 Senate special election was purely technical or ***de minimis*** and, therefore, did not justify an award of attorneys' fees. App. 8, 26. These findings are correct because this issue was collateral to the litigation, Petitioners' participation in the debate was superfluous, and the plan was precleared without any changes or objections.

Whether preclearance was required prior to the Senate's use of the 1992 court-ordered plan for District One in its 1994 special election was an entirely collateral issue to the redistricting litigation, which primarily concerned implementation of permanent redistricting plans in South Carolina based on the 1990 census. This Court ruled in *Hanrahan*, 446 U.S. at 758-59, that interlocutory or procedural victories that do not go to the merits of a claim, such as favorable discovery or evidentiary rulings,

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[11] Moreover, in light of the current litigation involving these same parties and district plans in which some black-majority districts have been ruled unconstitutional, *see Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996), it would be premature to award attorneys' fees to Petitioners as "prevailing parties" based on enactment of these plans.

cannot render a party "prevailing" for purposes of attorneys' fees awards.

In addition, the preclearance debate, which was initiated by the Senate -- not Petitioners or the United States -- primarily involved only the Senate and the United States (specifically, DOJ). After directly contacting DOJ to ascertain its position, the Senate requested the three-judge court's guidance concerning whether preclearance was required in order to use the court-ordered plan for District One for the special election. DOJ then filed a response asserting that preclearance was required. While Petitioners also filed responses asserting the same position as DOJ, their presence was superfluous because DOJ was directly involved and performing its designated function to enforce Section 5.

Donnell v. United States, 682 F.2d 240, 245-49 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983), demonstrates why an award of attorneys' fees is not appropriate for this claim. In that case, a county Board of Supervisors filed an action against the United States seeking a declaratory judgment that its proposed districting plan complied with Section 5. Various private parties intervened in support of the United States. After the United States prevailed on the basis that the county had failed to demonstrate a nondiscriminatory purpose for the plan, these private parties sought attorneys' fees as "prevailing parties." *Id.* at 244. In remanding to the district court for further consideration, the appellate court held that, "[w]here Congress has charged a governmental entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation." *Id.* at 248-49. The court reasoned that "Congress did not intend to allow private

litigants to ride the back of the Justice Department to an easy award of attorneys' fees." *Id.* at 249. Here, Petitioners made minimal, if any, contributions to the debate between the Senate and DOJ concerning preclearance.

Finally, the ***de minimis*** nature of any arguable success by Petitioners on this issue is illustrated by the fact that, after submission to DOJ, the proposed district was precleared by DOJ without any objections or changes. Thus, while there may have technically been a procedural victory in obtaining a court order requiring the Senate to obtain preclearance of the plan, there was no success on the merits, as *Farrar* requires, because the district was used in exactly the same form in which it was submitted. This procedural victory alone is insufficient to render Petitioners "prevailing" on this issue. *See Hewitt*, 482 U.S. at 760 (stating that a plaintiff could not be a "prevailing party" where "[t]he most that [the plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim"); *see also Leroy v. City of Houston*, 831 F.2d 576, 578 (5th Cir. 1987) (noting related case denying attorneys' fees to parties who filed a complaint seeking an order requiring preclearance because defendant had already submitted plan at time complaint was filed, and plan was subsequently precleared), *cert. denied*, 486 U.S. 1008 (1988). Thus, for all of the foregoing reasons, Petitioners are not entitled to attorneys' fees based on the three-judge court's Section 5 preclearance ruling.[12]

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[12] Even if this Court were to determine that Petitioners are "prevailing parties" entitled to recover some attorneys' fees, the Senate cannot be assessed attorneys' fees because it is an intervenor defendant. *See Independent Fed'n of Flight*

(Footnote continued)

CONCLUSION

As demonstrated above, the petition for writ of certiorari should be denied.

Dated: March 6, 1997

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(Footnote continued)

Attendants v. Zipes, 491 U.S. 754, 761 (1989) (Court denied award of attorneys' fees against labor union that intervened in employment discrimination action, stating that attorneys' fees should not be awarded against an intervenor defendant unless the "intervenor['s] action was frivolous, unreasonable, or without foundation"). Moreover, the Senate enjoys legislative immunity from attorneys' fees liability for its legislative actions in the redistricting process. *See Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 738-39 (1980) (principle of legislative immunity precludes awards of Section 1988 attorneys' fees premised on the exercise or nonexercise of legislative powers).

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 96-1086(L), 96-1099

STATEWIDE REAPPORTIONMENT
ADVISORY COMMITTEE, *ET AL.*,

Plaintiffs-Appellants,

v.

DAVID M. BEASLEY,
Governor of South Carolina, *ET AL.*,

Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

* * * *

[Page 10]

Appellants do not claim, as appellees contend, that they are prevailing parties based on catalyst theory. Brief for Defendants-Appellees, p. 16. The courts have, however, applied catalyst theory at "the secondary stage of evaluating the degree of success obtained" by a prevailing party. *Clark v. Sims*, 894 F. Supp. 868, 872 (D. Md. 1995). It is entirely appropriate for a court to take into account the benefits to the public at large and "the public

purpose served" by the litigation in determining a fee award. *Farrar v. Hobby*, 113 S. Ct. 566, 579 (1992) (O'Connor, J., concurring).

* * * *

(4)

No. 96-1201

Supreme Court, U.S.
FILED
MAR 19 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, et al.,

Petitioners,

versus

DAVID M. BEASLEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

I. The Issue of Catalyst Is Properly Before the Court

The Senate respondent's argument that the petition should be denied because petitioners disclaimed reliance on catalyst or causation theory in the court of appeals is without merit. Petitioners expressly relied on catalyst theory in the district court. As that court found, "[t]he Republican Party specifically claims that its lawsuit acted as a catalyst in bringing about redistricting." App. 18. Relying upon *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994), the district court rejected catalyst theory as a basis for a fee award. App. 18-9.

On appeal, petitioners also argued that the court should apply "catalyst theory" in evaluating the degree of success obtained by the litigation. Reply Brief for Plaintiffs-Appellants, p. 10 (arguing that "[t]he courts have . . . applied catalyst theory at 'the secondary stage of evaluating the degree of success obtained' by a prevailing party").[1] The catalyst issue was, moreover, fully litigated and decided by the court of appeals. The Senate respondent, for example, argued that the district court correctly applied *S-1 and S-2* "in finding that Plaintiffs were not prevailing parties because they had not obtained an enforceable judgment." Brief for Intervenor-Appellee the South Carolina Senate, p. 4. Respondent Wilkins argued

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[1] It is hardly surprising that petitioners did not rest their claim for fees in the court of appeals entirely on the catalyst theory. No litigant can be expected to stress a legal theory to a court which has previously rejected that theory as a matter of law.

that plaintiffs had not established a "causal connection[ ]" within the meaning of *S-1 and S-2* between the litigation and the adoption of legislative redistricting plans. Brief for Defendants-Appellees, p. 16. The decision of the court of appeals, as discussed in more detail *infra*, relied almost exclusively on whether a catalyst theory was available as a basis for a fee award. There is no merit in the respondent's contention that the catalyst issue was either not raised or was not fully litigated in the courts below.

In any event, it is a well recognized rule of this Court that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Here, the petitioners properly presented a claim for attorneys fees in the lower courts. They are therefore entitled to formulate "any argument they like[ ] in support of that claim," whether or not the argument was presented to the lower court. *Id.* at 535. *Accord, Dewey v. City of Des Moines*, 173 U.S. 193, 197 (1899) ("[p]arties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed"); *Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961, 965 (1995) (a party may make "a new argument to support what has been his consistent claim").

Even if petitioners' catalyst argument were misconstrued as a new claim or issue not raised below, it would still be properly before this Court since it was addressed and decided by the lower court. This Court's practice "permit[s] review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 40 (1992). *Accord, Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991) ("[i]t suffices for our

purposes that the court below passed on the issue presented"). The court of appeals undeniably decided the catalyst issue in this case. App. 6-8. Accordingly, that issue is properly before this Court.

II. The Decision Sought to Be Reviewed Is that of the Court of Appeals

Respondents argue at great length that the petition should be denied because of various findings and rulings by the district court. Brief in Opposition of Respondent Wilkins, pp. 9-13; Brief in Opposition for the South Carolina Senate, pp. 17-23. The argument is misplaced. The decision for which review is sought in this Court is not the decision of the district court but the decision of the court of appeals.[2]

The decision of the court of appeals, with the exception of its disposition of the Section 5 enforcement issue, was based entirely upon *S-1 and S-2*.[3] The court of appeals held that plaintiffs "fail to meet the standard set forth in *S-1 and S-2*," in that they did not secure "an enforceable judgment against the defendants." App. 8. Such was the entire extent of the court's agreement with the district court's ruling on the issue of catalyst. *Id.*

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[2] 28 U.S.C. § 1254(1), pursuant to which this petition was filed, confers jurisdiction upon this Court to review "[c]ases in the court of appeals . . . [b]y writ of certiorari."

[3] As to the Section 5 issue, the court of appeals held that the holding or judgment of the district court that the special senate election was subject to preclearance did not materially alter the relationship between the parties "such as to merit treatment as a 'prevailing party.' " App. 8.

No member of the court of appeals found that the securing of judicial and legislative redistricting was insignificant or merely technical success. To the contrary, Judge Motz in her concurring opinion expressly acknowledged that plaintiffs were "the 'catalyst' " for both judicial and legislative action. App. 10. The Senate respondent concedes, as it must, that in Judge Motz's view "Petitioners would have prevailed under the 'catalyst' theory." Brief in Opposition for the South Carolina Senate, p. 11 n.4. But for the litigation, "the court would not have intervened in the reapportionment process," and "the South Carolina General Assembly would not have adopted a scheme that drew heavily from that judicially crafted plan." App. 10. According to Judge Motz, "the 'catalyst' analysis was devised to address cases like the one at hand." *Id.* Plaintiffs presented "the classic 'but for' scenario." *Id.*[4]

Respondents repeatedly and improperly conflate the decision of the three-judge district court with that of the court of appeals. They argue that the outcome of the case in the court of appeals would remain the same whether or not it applied catalyst theory because the *district court* rejected the fee claim on catalyst grounds. Under our system of appellate review, however, the inconsistent rulings of a lower court do not trump those of an appellate court. *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (noting "the

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[4] In his concurring opinion Judge Niemeyer stated that he would affirm on the additional ground of no abuse of discretion by the district court, but he did *not* find that plaintiffs were unsuccessful "in the political process," only that in his view the issue was "unclear." App. 9.

hierarchy of the federal court system created by the Constitution and Congress"); *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975) (a decision of a panel of the court of appeals "is binding . . . upon the district court"). The contrary views of the district court in this case concerning the affect of applying causation analysis are unavailing and immaterial.

In light of Judge Motz's opinion, and the *per curiam* opinion's exclusive reliance upon *S-1 and S-2*, the court of appeals would surely have found petitioners to be prevailing parties under a theory of causation. The record admits of no other interpretation but that petitioners were prevailing parties and were denied fees solely because the Fourth Circuit law is that being a catalyst is not a basis for fees.

Despite the views of the district court, petitioners' success in this case was exceptional. They succeeded on the issues of the viability of the challenged plans, their appropriateness for continued use, impasse, and the Section 5 submission of the special election in Senate District One. Plaintiffs prevailed in their appeal to the Supreme Court and achieved other significant results, *e.g.*, court ordered and legislatively adopted redistricting plans and elections held in a timely manner. A judgment was entered ordering into effect redistricting plans under which elections were in fact held and legislators elected for the state house, senate and Congress. No amount of denial or obfuscation by respondents can disguise the fact that plaintiffs were enormously successful, nor discount "the public purpose served" by the litigation. *Farrar v. Hobby*, 113 S.Ct. 566, 579 (1992) (O'Connor, J., concurring).

III. The Adoption of Petitioners' Plans Is not a Condition for a Fee Award

The fact that the district court and the legislature did not adopt the specific plans advocated by petitioners is immaterial. As the complaints make clear, petitioners' primary goals were declarations that the existing plans were unlawful and court ordered interim plans that would allow the 1992 elections to go forward in a timely manner. App. 4 (plaintiffs "sought a declaration that the legislative process was at an impasse, thereby allowing for judicial intervention").[5]

A court rarely adopts a private party's specific plan. No plaintiffs would rationally pin all their hopes of being prevailing parties upon the fortuitous occurrence that a court would adopt exactly their redistricting proposals. For that reason lower federal courts have recognized that adoption of a party's proposed plan is not a condition for prevailing party status. *See Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435, 441 (D.C.Cir. 1982) ("[f]ee claimants under the Act need not show- . . . that their proposed plan was adopted in order to be found 'prevailing parties.' "); *Ramos v. Koebig*, 638 F.2d 838, 845 (5th Cir. 1981) ("that the district court rejected plaintiffs' plan . . . is irrelevant"); *Armour v. State of Ohio*, 774 F.Supp. 1044, 1063 (N.D.Ohio 1991) (plaintiffs were

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[5] The Senate respondent is mistaken that all plaintiffs "really wanted" was an order implementing their plans. Brief in Opposition for the South Carolina Senate, p. 13. What plaintiffs "really wanted" was timely elections pursuant to plans that preserved minority voting strength, and that is what they got.

prevailing parties despite the fact that the court refused to implement plaintiffs' proposed redistricting plan).

The cases relied upon by respondents are not only not to the contrary, but support the position of petitioners. *Daggett v. Kimmelman*, 811 F.2d 793, 801 and n.10 (3d Cir. 1987), citing *Commissioners Court of Medina County, Texas v. United States* and *Ramos v. Koebig* with approval, held that a " 'prevailing party' is entitled to an attorney's fee award for work performed in the remedy phase of redistricting litigation." Similarly, in *Hastert v. Illinois State Board of Election Commissioners*, 28 F.3d 1430, 1440 (7th Cir. 1993), also relied upon by respondents, the court concluded that one set of plaintiffs (the Nieves group) "should be considered a 'prevailing party' in this litigation, primarily because its fundamental objective, the creation of an Hispanic district, was achieved by the litigation." Another set of plaintiffs, the Urban League plaintiffs, were also deemed prevailing parties even though their plan was not adopted by the district court. According to the court of appeals, the "League plaintiffs . . . 'prevailed' as to the creation of the Hispanic district, the preservation of three African-American districts and retention of the Second Ward in the First District." *Id.* at 1442. The fact that the League's separate plan was not adopted, or that the League did not endorse the plan adopted by the court, was "surely an extraordinarily fine distinction, almost irrelevant to the substance of the redistricting process." *Id.* The court concluded that "the Urban League must also be considered a prevailing party." *Id.* Here, where plaintiffs achieved their objectives in securing remedial redistricting that allowed elections to be held in a timely and constitutional manner, and that

created or preserved majority black districts, the fact that their specific plans were not adopted is irrelevant to their status as prevailing parties.

IV. The Other Circuits Have no Difficulty in Applying Catalyst Theory

Respondents argue that *S-1 and S-2* represents the better rule because catalyst theory is unmanageable. The argument is makeweight. Judicial decisionmaking is by its nature demanding, but *all* of the other circuits apply causation theory in determining prevailing party status, and *none* has concluded that the standard is unworkable.[6]

Respondents themselves appear to have doubts about the rule in *S-1 and S-2*. They note "the number of cases from other circuits which subsequently have questioned *S-1*," and speculate that "it is possible that the Fourth Circuit might choose to modify S-1." Brief in Opposition of Respondent Wilkins, p. 19. That possibility, however, is not a basis for denying this petition. Here, the

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[6] Respondents also take petitioners to task for failing to note that the Court denied certiorari in *S-1 and S-2*, implying that the denial of certiorari somehow means approval of the decision of the lower court. To the contrary, as this Court has repeatedly stressed, "[t]he denial of a writ of certiorari imports no expression upon the merits of the case." United States v. Carver, 260 U.S. 482, 490 (1923). A denial of certiorari means nothing more than that the "Court has refused to take the case." Darr v. Burford, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting).

conflict among the circuits involving an important question of statutory construction is irreconcilable. The petition should be granted. *Shapiro v. United States*, 335 U.S. 1, 4 (1948).

CONCLUSION

The petition for a writ of certiorari should be granted.

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